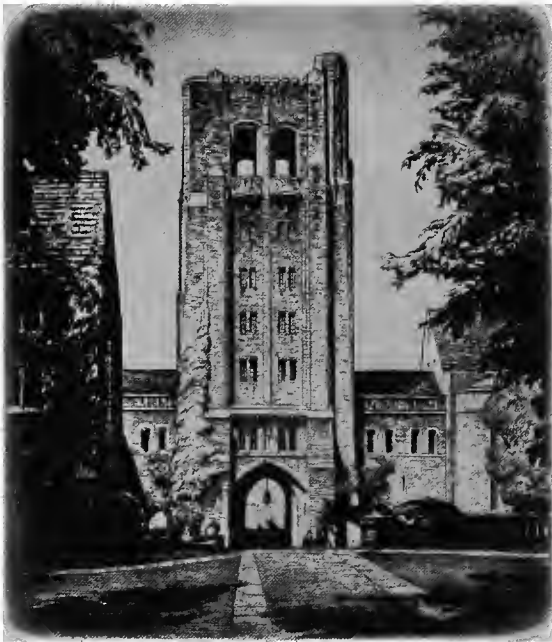


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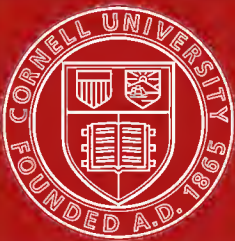
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A PARTIAL COLLECTION
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CASES AND OTHER AUTHORITIES
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LAW OF MORTGAGE

BY

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NEW YORK,
1899.



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AUTHORITIES ON THE LAW OF MORTGAGE.

INTRODUCTION.

PROPERTY SECURITY FOR DEBT.

JUST. INST. Lib. iv. c. 6, sec. 7. Again, the Servian and quasi-Servian actions, the latter of which is also called "hypothecary," are derived wholly from the Praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of a pledge (*pignus*) as security for his rent. The quasi-Servian action is a similar remedy open to any creditor for the purpose of enforcing his pledge or *hypotheca*. So far then as this action is concerned, there is no difference between a pledge and a *hypotheca*; and, indeed, whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called by either name. In other respects, however, there is a distinction between them; for the term, pledge, is properly used only where possession of the property in question is delivered to the creditor, especially if such property be moveable; whereas by the term *hypotheca*, strictly speaking, we signify a right arising by mere agreement without delivery of possession.

Moyle, Imp. Just., *Inst. Excur.* II, p. 6. The latest and most refined form of pledge is *hypotheca*, in which there was no conveyance of either ownership or possession; it was effected by a bare, formless agreement between the debtor and creditor, that certain specific property of the former should be liable in full for his debt to the latter, who should be entitled to sell in default of payment within a prescribed time: "*Contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae: nec ad rem pertinet, quibus fit verbis.*" Dig. 20, 1. 4. Such an agreement, in itself, was inoperative to create rights, either real or personal; it was, however, enforced by the praetor, who treated the right of sale as a *ius in re aliena*, of which the creditor could not be deprived by any subsequent act of the debtor, and which he could successfully assert (by remedies of his own introduction) against any other person whatsoever, whether the creditor, his successor, alienee or trustee in bankruptcy. * * *

Hypotheca possessed great advantages over the earlier forms of pledge, of which *fiducia* was quite obsolete in the time of Justinian. The pledgor was never deprived of the use and possession of his

property, and yet the creditor was absolutely secured. The class of pledgable objects was largely augmented: Money could now be lent on the security of things not yet in existence. e. g., future crops and expectations (*et quae nondum sunt, futura tamen sunt, hypothecae dari possent, ut fructus pendentes, partus ancillae, fetus pecorum.*" Dig. 20, 1, 15) or of mere incorporeal rights, real and personal. (Dig. 20, 9, 1; *ib.* 11, 2; Dig. 13, 7, 18, pr.) Moreover, it became possible to create a general mortgage, which was done by statute, in favor of many classes of persons: e. g., of a wife or other person who gave a *dos* over the property of her husband, to secure its return, and of pupils over that of their guardians.

GLANVILLE, LIB. X, cc. 6, 8, 11 (Beames).

A Loan is sometimes made, upon the Credit of a putting in Pledge. When a Loan of this description takes place, sometimes movables, as Chattels, are put in pledge; sometimes immovables, as Lands and Tenements, and Rents, whether consisting in Money, or in other things. When a Compact is made between a Creditor and Debtor, concerning the putting any thing in pledge, then, whatever be the mode of pledging, the Debtor upon his receiving the thing lent to him, either immediately delivers possession of the Pledge to the Creditor, or not. Sometimes also a thing is pledged for a certain period, sometimes indefinitely.

Again, sometimes, a thing is pledged as a Mortgage, sometimes not. A pledge is designated by the term Mortgage, when the fruits and Rents, which are received in the interval, in no measure tend to reduce the demand for which the pledge has been given.

When a Compact is entered into between a Debtor and Creditor, concerning the pledging of a particular thing, if the Debtor, after having received the Loan, should not deliver the pledge, it may be asked, what step should the Creditor have recourse to in such a case, especially as the same thing may be pledged to many other Creditors, both previously and subsequently? Upon this subject, it should be remarked, that the King's Court is not in the habit of giving protection to or warranting private agreements of this description, concerning the giving or accepting things in pledge, or others of this kind, made out of Court, or even in any other Court than that of the King. If, therefore, such Compacts are not observed, the King's Court does not interfere; and hence it is not bound to answer concerning the right of different Creditors, as prior or subsequent, or respecting their privileges.

But, when an immovable thing is put into pledge, and Seisin of it has been delivered to the Creditor for a definite term, it has either been agreed between the Creditor and Debtor, that the proceeds and rents shall in the mean time reduce the Debt, or that they shall in no measure be so applied. The former Agreement is just and binding; the other, unjust and dishonest; and is that called a

Mortgage, but this is not prohibited by the King's Court, although it considers such a pledge as a species of Usury. Hence, if any one die having such a pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the Effects of a Usurer.

In other respects, the same Rules should be observed, as in pledges of movables, concerning which we have already spoken. But, it must be remarked, that if, after any one has paid his Debt, or has in a proper manner tendered it, the Creditor should maliciously detain the pledge, the Debtor upon complaining to the Court shall have the following Writ, etc.

If the Creditor lose his Seisin, either by means of the Debtor, or any other person, he cannot recover it through the assistance of the Court; not even by a Recognition of Novel Disseisin.

For if he was unjustly and without a judgment disseised of his pledge, by any other person than the Debtor himself, the Debtor may have an Assise of Novel Disseisin. If, however, the Creditor was disseised by the Debtor himself, the Court will not assist him against the Debtor, in recovering his pledge, or in giving a Re-entry, unless through the Debtor himself; for the Creditor should resort to an original Plea of Debt, in order that the Debtor may be compelled to render him satisfaction for his Debt.

Using the word *vadium*, gage, whether the possession was to be turned over to the pledgee or not, the Norman judges recognized gages or pledges of land, either with or without transfer of possession. If the pledgee took possession, the transaction was a pawn; if not, it was a hypothecation.

It would the greatest mistake to suppose that the feudal seisin was essential to an effectual pledge of land in feudal times. The pledgee might leave the pledgor in possession, and still be secure by recording a written contract of pledge in the King's Court: precisely as, under Justinian, such a contract would have been registered in a public office, or, under the Saxon laws, in a county court or a monastery. This provision for registration was a mere adaptation to English ground of the Roman system.

Even when the pledgee of land, in feudal times, took possession, he did not take a full feudal seisin; he took only a "quasi" seisin, a seisin "*devadio*," as it was called—a "pledgee's seisin"—a seisin distinct from a general seisin, not exclusive of that of the pledgor, but consistent with and dependent upon it—a parasitic seisin. The word "seisin," of course, was not exclusively applied to freehold estates in land, but was used of chattels and of chattel estates in land, as leaseholds. And just as a lessee of land had not a seisin of his own, but had his landlord's seisin, so in the case of a pledge, even with the possession, the freehold was deemed to remain in the pledgor, and the pledgee was said to be seised "through" the owner of the fee—to be seised not in his own name, but in the name of another. The

heirs of the pledgee who died in possession were spoken of in contradistinction from the "*verus hæres*." The fact that the land so in pledge, and even in the possession of the pledgee, was still viewed as in the seisin of the pledgor, appears from the fact that it was subject to dower, not of the pledgee's, but of the pledgor's widow; and there could be no dower without seisin. If a pledgee in possession were ousted by a stranger, he could not maintain a writ of novel disseisin to recover possession; the pledgor had to bring the action, counting on his own seisin. And where one seised as pledgee died in possession, and his heir, being excluded, brought a writ of *mort d'ancestor*, to get possession, he was provided, not with the ordinary writ of *mort d'ancestor*, counting upon seisin generally, but with a special writ, alleging in his ancestor a seisin *de vadio*.

The legal remedy for enforcing a simple gage or pledge of land, in the time of Glanville, so far from having those harsh features which we are wont to attribute to our early law, followed that just and equitable system of Roman law which was the cradle of our equity. When a debt secured upon land was due, the pledgee had a writ expressly framed for foreclosure, substantially identical with the Massachusetts writ of entry for foreclosure of a mortgage. The process could be enforced by the courts by a seizure of the property pledged, if it remained in the pledgor's possession, or by other distraint; and there was a conditional judgment precisely as there is upon the Massachusetts writ of entry for foreclosure, that the debtor should still have a reasonable time to pay before the foreclosure should become absolute.—4 Harvard L. R. 6 (Chaplin).

§ 332. Item, if a feoffment be made upon such conditions, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much to say in French as mortgage, and in Latin *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

§ 333. Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in taylor in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

§ 334. Also, if a feoffment be made in mortgage upon condition, that the feoffor shall pay such a sum at such a day, &c., as is between them by their deed indented agreed and limited, although the feoffor dieth before the day of payment, &c., yet if the heir of the

feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land, and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c., not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c., and the intent was but that the money should be paid at the day assessed, &c., and the feoffee hath no more loss, if it be paid by the heir, than if it were paid by the father, &c.; therefore, if the heir pay the money, or tender the money at the day limited, &c., and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c., will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

§ 335. And be it remembered that in such case, where such tender of the money is made, &c., and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c., then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him.

§ 337. Also, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: In this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is passed. For when the condition is, that if the feoffor pay the money to the feoffee, &c., this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c., and when the feoffor dieth, then the time of the tender is passed. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is aforesaid, for that the time of the tender was not passed by the death of the feoffor. Also, it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c.

§ 338. And note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards.

Co. 209. a. This is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a duty before, though the feoffor enter by force of the condition, yet the debt of duty remaineth. As if A. borroweth a

hundred pound of B., and after mortgageth land to B. upon condition for payment thereof. If A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding infeoffee B. of land upon condition for the payment of a hundred pounds to B. in nature of a gratuity or gift. In that case if he tender the hundred pound to him according to the condition, and he refuseth it, B. hath no remedy therefor, and so is our author in this and his other cases of like nature to be understood.

LIT. 339. Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and, therefore, the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at day appointed, &c.

2 BLACKST. COM. 157.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

Estates held *in vadio*, in *gage*, or pledge, which are of two kinds, *vivum vadium*, or living pledge, and *mortuum vadium*, dead pledge, or mortgage.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But *mortuum vadium*, a dead pledge or mortgage (which is much more common than the other), is where a man borrows of another a specific sum (e. g. £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, for-

ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it, therefore, became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter upon the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*; and this enables a mortgagor to call on the mortgagee who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate unless where the security is precarious, or small; or where the mortgagor

neglects even the payment of interest; when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II, ch. 20, after payment or tender by the mortgagor of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his security. In Glanville's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor: "Si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land, "Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invidiari." And the frauds which have arisen since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I, *de mercatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, ch. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of Parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; whereby the benefit of this mercantile transaction is extended to all the King's subjects in general, by virtue of the statute 23. Hen. VIII. ch. 6. amended by 8 Geo. I. ch. 25, which directs such recognizances to be enrolled and certified into

chancery. But these, by the statute of frauds, 29 Car. II, ch. 3, are only binding upon the lands in the hands of *bona fide* purchasers, from the day of their enrollment, which is ordered to be marked on the record.

Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them; the statute, therefore, of Westm. 2, permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in same year) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though one-half of them was liable to be taken in execution for any other debt of the owner.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple and *eligit*, with the observation of Sir Edward Coke. "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds" (which make them an exception to the general rule), "because, though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors; for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*." This, indeed, only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir, which is probably owing to this: That, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable from a principle of nat-

ural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of the profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors, because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

4 KENT, COM. 140.

The law of pledges shows an accurate and refined sense of justice, and the wisdom of the provisions by which the interests of the debtor and creditor are equally guarded, is to be traced to the Roman law, and shines with almost equal advantage, and with the most attractive simplicity, in the pages of Glanville.

It forms a striking contrast to the common law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere right of re-entry, upon performance of the condition, by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default, the condition was forfeited, and the estate became absolute in the mortgagee, without the right or hope of redemption. So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice, naturally led to exact and scrupulous regulations concerning the time, mode and manner of performing the condition, and they became all important to the mortgagor. The tender of the debt was required to be at the time and place prescribed; and if there was no place mentioned in the contract, the mortgagor was bound to seek the mortgagee, and a tender upon the land was not sufficient.

"Among conditional estates are mortgages of land and tenements. These are sometimes of the freehold and inheritance, and sometimes for a term of years only.

1. Of the freehold and inheritance: Where a feoffment is made upon condition, that if the feoffor pay the feoffee £40 at a certain day, then he shall re-enter, &c. Here the land and all the feoffor's estate in it pass presently to the feoffee by common law; and the feoffor has only the condition left, and no estate in the land that he can assign over. *Co. Lit.* 205. a. So if one here, by deed duly acknowledged and registered, conveys his land to another and his heirs upon the like condition, the land and all the mortgagor's estate in it pass presently to the mortgagee by force of the provincial act of 9 Will. 3. c. 7: (1 P. Will. 74.) * * *

"It is objected to this doctrine, that Lord Mansfield, in considering what species of property a mortgage has in the estate mortgaged lately, said (2 Burr. 978, 979), that "a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence, nay, it would do it though the debt were forgiven only by parole; for the right to the land would follow, notwithstanding the statute of frauds." (3 Cha. Rep. 3.)

"Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed nor redeemable, the judge of probate has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever, in fee. * * *

In order the better to settle the authority of these propositions, said to have fallen from Lord Mansfield, it may not be amiss, first to consider the third proposition, viz.: "that the estate in the land is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing, as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. Its renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord Mansfield did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the close as land, it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple which the mortgagee had in the close

by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent, agreeably to what Lord Keeper Wright said in *Gilb. Eq. Ca. 3.* in the case of a mortgage in fee.

The money due on the mortgage could not, by Lord Mansfield, be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money, so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee: That the former was but a chattel and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of Chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together; as though there was no difference between them, which is not reasonable to suppose Lord Mansfield ever did; and, therefore, it must be supposed the reporter did not take down the restrictions, with which his lordship qualified his propositions, and left them to be implied by the reader. * * *

For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not re-vest the fee in him in law, nor even in equity; because the mortgagee is deemed in such a case by the Court of Chancery a trustee of the mortgagor, &c., until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land. (3 Chan. Rep. 3.) And surely, forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance. * * *

Upon the whole the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, even after it has become irredeemable, may be distributed by the judge of probate as personal estate," is evident. * * *

Authorities showing the estate, both legal and equitable, to be in the mortgagee. 2 Atk. 352-4. 2 Cha. Ca. 97. 1 Cha. Ca. 285.

Per Trowbridge, J., Of Mortgages, 8 Mass. 551.

BOOK I.
ESSENTIAL ELEMENTS OF MORTGAGE.

CHAPTER I.

SECURITY.

KELLERAN v. BROWN.

[4 *Mass.* 443.—1808.]

THIS was a writ of entry, and upon the general issue pleaded was tried before Thatcher, J., September term, 1806, when a verdict was rendered for the demandant.

In support of the action, the demandant read in evidence a deed of Timothy Manly conveying the land demanded to the demandant in fee.

The tenant, in defense of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises as his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz.: "Thomaston, May 26, 1800. I, Edward Kelleran, the subscriber, having purchased of Timothy Manly a lot of land lying in said Thomaston, containing fifty acres (being the lot which the said Manly purchased of Ebenezer Bly) for which I have received a warranty deed; but if the said Manly shall repay me the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. Edward Kelleran;" and also offered to prove to the jury that the tenant, Brown, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence, as inadmissible. To which opinion the judge the counsel for the tenant excepted, as erroneous; whereupon the cause stood continued for the opinion of the Court upon the said exceptions.

At last June term in this county, the cause was briefly spoken to by Mellen in support of the exceptions, and thence continued for advisement, and now the opinion of the Court was delivered by

PARSONS, C. J. The demandant has sued a writ of entry, to recover his seisin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is the tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kellaran in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand of the following tenor: (Here his Honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was, therefore, estopped from proving that he had not the freehold, but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeasance at common law of the conveyance made by Manly to the demandant, the tenant might have read it in evidence, to show that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged. And if we had all the equity powers of a Court of Chancery, I should be satisfied that the conveyance in this case, with the written contract of conveyance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

But the equity powers of this Court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeasance. (Vide Statutes 1785, c. 22; 1798, c. 77.) Now a defeasance of any instrument of conveyance, must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as part of it; so that the conveyance and defeasance must be taken together, and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed. In this case the conveyance by Manly to Kellaran was by deed, and the agreement by Kellaran was merely by a simple contract; and, however it might in equity have the effect of a defeasance, at law it is not a defeasance of the deed of Kellaran.

The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term

less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. The written contract to Keleran not under his seal was, in our opinion, properly rejected as evidence.

Judgment according to the verdict.

HODGES v. THE TENNESSEE MARINE AND FIRE
INSURANCE CO.

[8 N. Y. 416.—1853.]

JOHNSON J.* The determination of the judge in allowing the amendment of the pleadings was within his discretionary power, and is not the subject of review, in this Court.

The remaining question in the cause relates to the existence of an insurable interest in Slamm at the time of the assignment of the policy to Hodges and of the loss. If such an interest existed, then the plaintiff's recovery cannot be disturbed.

Upon the evidence there is no doubt of the following facts: That at the time when the insurance was effected, September 1, 1848, Slamm was the owner in fee of the premises insured; that on the 4th of September, 1848, he conveyed the premises to Hodges by a deed absolute upon its face, but intended to operate as a mortgage, and that upon the same day he transferred the policy to Hodges as collateral security, and that this transfer was made by the assent of the company.

If there is no rule of law forbidding us to take notice of the fact that the deed was intended as a mortgage, then beyond all question Slamm as the owner of the equity of redemption in the premises had an interest in the insurance which had been effected by him as the owner of the fee, and the assignment with the company's assent transferred this interest to Hodges as collateral security, and he may upon the ground of the same interest sustain the recovery which has been had in this case.

The question then, taking it most strongly against the plaintiff, is, whether in equity Slamm might have a bill to redeem against Hodges, notwithstanding the deed was absolute upon its face. *Webb v. Rice*, 6 Hill, 219, does not conflict with the proposition

*The opinion only is here given.

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that such a bill might be maintained. It only professes to decide that at law unwritten evidence is inadmissible to show that a deed was intended as a mortgage. From an early day in this State the admissibility of such evidence had been established as the law of our Courts of Equity, and it is not fitting that the question should now be re-examined. Upon the authority of *Strong v. Stewart*, 4 J. C., 167; *Clark v. Henry*, 2 Cow., 332; *Whitlick v. Kane*, 1 Paige, 206; *Van Buren v. Olmsted*, 5 Paige, 10; *McIntyre v. Humphreys*, 1 Hoff. 34, with which agree *Taylor v. Little*, 2 Sumner; 228, *Jenkins v. Eldredge*, 3 Story, 293, in all which cases except *Clark v. Henry*, the point was directly before the court, we think that the plaintiff's recovery in this case ought to be sustained.

DESPARD v. WALBRIDGE.

[15 N. Y. 374—1857.]

This action was brought to recover for the use and occupation of a store, in Buffalo, by the defendant, from May 1st, 1851, to August 1st, 1851, which the complaint averred to be worth \$375. It also averred that the defendant on May 1st, 1851, agreed to pay for such use and occupation \$1,500 per annum, payable quarterly. The action was tried before a referee, who found the following facts: On the 8th of March, 1850, one Sherwood demised to H. B. Ritchie the store above mentioned, and another adjoining, for two years from the first of May then next, with a right of renewal on certain conditions, Ritchie covenanting to pay a certain rent. On the 17th of November, 1850, Ritchie assigned this lease and his title to the term thereby granted to the plaintiff. At the time of such assignment the defendant was in possession of the premises as a subtenant of Ritchie, under a lease executed April 30th, 1850, for the term of one year from May 1st, 1850.

Sherwood, the original lessor, on the 9th of October, 1850, assigned his interest in the lease executed by Ritchie to Robert Codd for the purpose of securing a debt which he owed to Codd. On the 19th of November, 1850, Ritchie assigned to Codd all his interest as landlord in the sub-lease executed between himself and the defendant. The defendant occupied the premises under the lease from Ritchie, and after the assignment thereof to Codd paid the rent to the latter. On the 1st day of May, 1851, the plaintiff served on the defendant a written notice that he was the assignee of Ritchie's term, and that in case the defendant held over beyond his term, then at the point of expiring, the plaintiff would consider the premises as held and taken by defendant for the term of one year from May 1st, 1851, at the annual rent of \$1500, payable quarterly.

The plaintiff, having proved these facts, rested his case, and the defendant moved for a nonsuit, which, being refused by the referee, he took an exception. Other exceptions were taken upon the trial,

and to the referee's report, which, with the facts relating thereto, sufficiently appear in the opinion of the court. The referee reported that the defendant occupied under an implied agreement to pay what the occupation of the premises was reasonably worth, which he found to be at the rate of \$1,200 per annum. Judgment was entered upon his report, which was affirmed by the Supreme Court at general term, and the defendant appealed.

SELDEN, J.* The principal question is that which arises upon the exception stated in the referee's report. It is set forth in the answer, in substance, that the assignment of the Sherwood lease from Ritchie to the plaintiff was made at the request and for the benefit of Codd, and for the sole purpose of aiding the latter in the collection of his debt against Sherwood. It is also stated that this debt had been fully paid before May 1st, 1851, by Hiram E. Howard, who had succeeded to the rights of Sherwood in the premises, and that Ritchie, on the 1st of May, 1851, surrendered all his rights in the premises to Howard, whose tenant the defendant then became. These facts the defendant offered to prove and his offer was rejected. * * * * *

But it is urged that the proof offered was properly excluded for another reason. The assignment to the plaintiff being absolute in its terms, it is said that parol evidence was inadmissible to show that it was intended as security merely; and the case of *Webb v. Rice* (6 Hill, 219), is cited in support of this position. It was held in that case that in an action at law parol evidence could not be received to show that a deed, absolute upon its face, was intended as a mortgage. It was conceded, however, that the rule was settled otherwise in equity. In the case of *Hodges v. The Tennessee Insurance Company* (4 Seld., 416), this court held that the rule in equity continued the same since the case of *Webb v. Rice* as before. The only question, therefore, upon this subject is whether the equity rule is applicable to the present case, which is a purely legal action. As, however, since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the action, there would seem to be but little room for doubt upon the point. (*Dobson v. Pierce*, 2 Kern, 156; *Crary v. Goodman*, id., 266; Code, § 150, subd. 2.) That a deed absolute on its face was intended as a mortgage, would, before the Code, have been an equitable defense, because it could not have been proved at law. In order that it should now be made available in legal actions, as provided by the Code, the evidence to establish it must be admitted in that class of actions.

*Only portions of the opinion are given.

It may still be said that, admitting it to be shown that the assignment to the plaintiff was merely collateral to the debt of Sherwood to Codd, and that this debt had been fully paid prior to May 1st, 1851, yet so long as the lease was not reassigned, the legal title remained in the plaintiff, and that Ritchie could not surrender the lease while this title remained outstanding. The answer to this is, that if the assignment was collateral, it is the same as if the condition had been incorporated in the assignment itself, that upon payment of the debt the rights of the assignee should cease; and in such a case it is clear that no formal reassignment would be necessary. Whatever might be the effect of such an assignment in the hands of a subsequent *bona fide* assignee, it cannot be set up by the original assignee as evidence of a subsisting title in him, after full performance of the conditions upon which it was made.

There is still another question of fact which arose at the trial, but which was not passed upon by the referee, viz., whether the assignment to the plaintiff was intended as a security not only for the debt of Sherwood to Codd, but for that of Ritchie also. Should it turn out upon the new trial that the lease was assigned as security for both debts, and either remained unpaid on the 1st of May, 1851, then the case on the part of the plaintiff would be made out.

The judgment must be reversed and a new trial must be ordered, with costs to abide the event.

All the judges who had heard the argument concurring in this opinion, *New trial ordered.*

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"It is now too late to controvert the proposition that a deed, absolute upon its face, may, *in equity*, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and *fraud or mistake* in the preparation or as to the form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties. *The courts of this State are fully committed to the doctrine*; and, whatever may be the rule in other States, here in passing upon the question we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact that the adjudications have entered into and controlled business transactions and become a rule of property, to authorize a reconsideration of the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. *Notwithstanding their protests the rule has been, upon the fullest consideration, deliberately established*, and cannot now be lightly departed from. The principle was recognized by the Chancellor in *Holmes v. Grant*

(8 Paige, 243). Although it was not applied in that case, and had been before asserted under like circumstances in *Robinson v. Cropsey* (2 Edw. Ch. R., 138); affirmed (6 Paige, 480).

It was expressly adjudged in *Strong v. Stewart* (4 J. C. R., 167), that parol evidence was admissible, to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect in *Clark v. Henry* (2 Cow., 324); which was followed by this court in *Murray v. Walker* (31 N. Y. 399). In *Hodges v. Tennessee Marine and Fire Insurance Co.* (4 Seld., 416) the court says that "from an early day in this State the rule that parol evidence is admissible for the purpose named has been established as the law of our courts of equity, and it is not fitting that the question should be re-examined, and the cases in which it has been so adjudged are cited with approval." In *Sturtevant v. Sturtevant* (20 N. Y., 39), the same judge pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust, and it was decided that while a deed absolute in terms could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see *Despard v. Walbridge* (15 N. Y., 374). The rule does not conflict with the other rule, which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid, whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties." Allen J., in *Horn v. Keteltas* 46 N. Y., 605, 609 (1871).

MATTHEWS v. SHEEHAN.

[69 N. Y. 585.—1877.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought by plaintiff, as administratrix with the will annexed, of Dennis O'Keefe, deceased, to recover moneys alleged to have been collected by defendant upon a policy of insurance issued upon the life of said O'Keefe, and assigned by him to defendant as security for advances made by the latter.

EARL, J. In December, 1869, an arrangement was made between the plaintiff's testator, O'Keefe, and the defendant, whereby O'Keefe was to procure a policy of insurance on his life from the Phoenix Life Insurance Company, and assign it to the defendant, who was to pay the premiums and have the benefit of the policy, with the understanding that if at any time O'Keefe desired to redeem the policy, he could do so by paying the premiums advanced by defendant, with the interest thereon. In pursuance of this ar-

rangement, O'Keefe procured the company to issue a policy on his life, which was immediately assigned to the defendant by an assignment absolute in form, and he paid all the premiums to the time of O'Keefe's death in 1874. Before that time *O'Keefe*, for the purpose of redeeming the policy, *offered to pay the defendant the amount advanced by him for the premiums, and defendant refused to take the money.* After the death of O'Keefe, the defendant received from the insurance company the amount insured, and retained the same, refusing, upon plaintiff's demand, to pay any portion thereof to her. This action was brought to recover the sum received by the defendant, less the amount for which he held the policy as security. Upon the trial, the facts above stated appearing, and there being no conflicting evidence, the court directed a verdict for the plaintiff.

The verdict was properly directed. Upon the undisputed evidence, O'Keefe had the option to treat the policy as a security for the premiums paid by the defendant, and to redeem the same. While O'Keefe was not bound to redeem, or personally liable for the money advanced by the defendant, there was sufficient consideration for the arrangement made. O'Keefe submitted to examination, procured his life to be insured, and assigned the policy to the defendant in consideration that the defendant would pay the premiums and give him the option to redeem. *The substance and legal effect of the transaction was to make the defendant a mortgagee of the policy to secure him for the premiums paid, and he could not claim an absolute title thereto, except upon O'Keefe's failure to exercise his option to redeem.* This was not simply an agreement by the defendant to sell to O'Keefe, upon payment by him of the amount of the premiums advanced with interest, a policy absolutely belonging to the defendant, an agreement void under the statute of frauds; because there was no writing or part payment. It was an agreement that the defendant might take and hold the policy as security and the right to redeem attended the policy into the defendant's hands, and at all times affected his title. Such an agreement may be shown by parol, although the assignment be absolute in form. (*Hodges v. The T. M. and Fire Ins. Co.*, 8 N. Y., 416; *Despard v. Walbridge*, 15 N. Y., 374; *Horn v. Keteltas*, 46 N. Y., 605; *Hope v. Balou*, 58 N. Y., 380.)

It matters not that O'Keefe did not absolutely promise to pay the amount which defendant should advance for the premiums. To constitute a valid mortgage it is not essential that the mortgagee should have any other remedy but that upon his mortgage. This is recognized by the Revised Statutes in references to real estate mortgages (1 R. S. 739), which provide that when there shall be no express covenant in the mortgage for the payment of the money received, and no bond or other separate instrument to

secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. In all cases the remedy of the mortgagee may by the agreement of the parties be confined to the mortgage.

It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. No general rule upon the subject can be laid down which will govern all cases, although it is said that the fact that there was no debt which could be personally enforced is a strong, but not an absolutely controlling circumstance, that the transaction was not a mortgage, but a sale and a conditional resale. *In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale*, because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited (*Longuet v. Seawen*, 1 Ves. Sen., 402; *Glover v. Payn*, 19 Wend., 578; *Conway's Exrs. v. Alexander* 7 Cranch, 218; *Edrington v. Harper*, 3 J. J. Marshall, 354; *Floyer v. Lavington*, 1 P. Wms., 268; *Chapman's Admin'r v. Turner*, 1 Colls. R. 280; *Wharf v. Howell*, 5 Binney, 499.)

In *Floyer v. Lavington*, it is said:

"As to the objection that there was no covenant for the payment of the principal or interest, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz.: for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance, as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage." In *Brown v. Dewey* (1 Sandf. Ch. R., 56), it was held that "the absence of the personal liability of the grantor to repay the money is not a conclusive test in deciding whether the conveyance is absolute or is intended as a security." In *Holmes v. Grant* (8 Paige, 243, 257), Denio, V. C., says: "It is not essential that the personal remedy against the mortgagor should be *preserved*. There is a debt *quoad* the redemption, but not in respect to the personal remedy." In *Flagg v. Mann* (14 Pick., 467), PUTNAM, J., says: "There was no collateral undertaking on the part of Luther (the grantor) to pay the money which Walker and Fisher (grantees) should advance in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage, or a sale with a contract for a repurchase upon strict terms. (See also *Rice v. Rice*, 4 Pick., 349.) In *Kerr v. Gilmore*

(6 Watts, 405), KENNEDY, J., says: "The want of a personal security for the repayment of the money has, taken in connection with other circumstances, been regarded as tending to show that a defeasible purchase and not a mortgage was intended, but this circumstance alone has never been held sufficient to prevent a redemption." Again, "that the mortgagee should have a remedy against the person of the mortgagor also, in order to make the conveyance a mortgage, is more than I can assent to." * * * In *Horn v. Keteltas* (*supra*), ALLEN, J., says that the circumstance that there was no agreement to pay the money secured is one entitled to considerable weight in determining whether a conveyance was intended as a mortgage, but that it is only one of the circumstances to be considered, and not conclusive; and Ch. J. MARSHALL, in *Conway's Exrs. v. Alexander* (7 Cranch, 218), says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

It is clear, therefore, both upon principle and authority, that the circumstance that O'Keefe was not personally obligated to pay to the defendant the amount of the premiums which he should advance is not absolutely controlling upon the question, whether there was a mortgage, or a sale and a conditional resale. It is an important circumstance in such cases and, in the conflict of evidence, not unfrequently a controlling one. There are many cases, some of which are cited by the learned counsel for the appellant, in which it has been held to be not as matter of law conclusive, but as matter of fact decisive. If we should hold this to be a case of conditional resale, and that the consequence follows which has been so learnedly argued on behalf of the defendant, that the agreement is void under the statute of frauds, the intention of the parties would be defeated. This is, therefore, a case where the court should lean to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a re-purchase or a re-sale, or a re-assignment, but *the right to redeem was expressly stipulated*. The language used shows that the parties intended that the policy should be held as *security* for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a *mortgage* or a *pledge*, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other.

The judgment must therefore be affirmed.

CONWAY v. ALEXANDER.

[† Cranch, 218.—1812.]

MARSHALL, Ch. J., delivered the opinion of the Court as follows:*

This suit was brought by *Walter S. Alexander* as devisee of *Robert Alexander*, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between *Robert Alexander* of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seized of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs, and assigns forever. and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of £700, with interest from the said 20th day of March, 1788. And if the said Robert Alexander shall pay the said William Lyles on or before that day the said sum of £700 with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of £700; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th day of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of £700, convey the said land in fee to William Lyles. On the 23rd of August, 1790, William Lyles, in consideration of £900, conveyed the said twenty acres of land and 140 acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an

*This statement of facts is omitted.

exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of £700, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. *But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.*

In this case *the form of the deed is not in itself conclusive* either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words

of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the £700 on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as least possible that a division might be useless.

Having made these observations on the deed itself the Court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a pre-existing debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource. To this circumstance the Court attaches much importance. Had there

been any treaty, any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a Court of Chancery will invariably defeat. His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage he would naturally have resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional implies an expectation to redeem. A conditional sale made in such a situation at a price bearing no proportion on the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at £5 per acre conditionally, which, in fact, were worth £15, or £20, or £50 per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for £5 per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the Court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.

Decree reversed.

The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral paper—the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland v. Blake*, 79 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on *inadequacy of consideration* where there is a considerable disproportion between the price paid and the real value of the property. *Russell v. Southard*, 12 How., 139, 148. There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*, and Coyle's interest was a minority interest. These considerations made it difficult of sale at all. *Per* Blatchford, J., in *Coyle v. Davis*, 116 U. S. 108, 112.

STODDARD v. WHITING.

[46 N. Y. 627.—1871.]

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of defendant, entered upon the report of a referee.

The action is brought by plaintiff, as assignee of Abiel Stoddard, to redeem certain real estate, alleged to have been conveyed to defendant as security for the repayment of certain advances made and liabilities incurred by him. The facts are sufficiently set forth in the opinion.

Grover, J.* From the facts found it appears that in April, 1864, one Abiel Stoddard, entered into a written contract with the owner for the purchase of a parcel of land situate in the County of Saratoga, for the sum of \$2,500, to be paid in one year, upon payment

*Parts only of the opinion are given.

of which he was to receive a conveyance of said land from the vendor; that he entered into possession of the land by the consent of the vendor; that about the time the purchase money became due, being unable to pay it, he entered into a parol contract with the defendant, by which he was to advance for him to the vendor \$500 and receive a conveyance from the vendor of the land in his own name, and upon receiving such conveyance execute to one Davison a mortgage upon said land for \$2,000, together with his bond for the same amount, with the proceeds of which the vendor was to be paid the balance of the purchase money; that it was further agreed that the defendant should hold the title thus acquired as security for the money advanced by him and the liability incurred, and also as security upon another transaction between the parties, and permit Stoddard to redeem the same in one year, or at some time thereafter which was not particularly specified; that this agreement was so far executed that in pursuance thereof the vendor was paid, and a conveyance of the land executed to the defendant; that Stoddard continued in possession of the land for about two years, receiving the profits thereof, and made improvements thereon to the amount of \$200. That at the expiration of that time the defendant entered into possession, and has since received the rents and profits, and cut and removed timber therefrom of considerable value. That Stoddard has not paid the defendant the money advanced by him, or any part thereof. That Stoddard, before the commencement of the action, by an instrument in writing by him signed, but not sealed, for a valuable consideration assigned and transferred to the plaintiff all his right, title and interest in and to the premises, whether legal or equitable. From these facts the legal conclusions of the referee were, (1) that the plaintiff was not entitled to redeem; (2) that the defendant was the legal owner of said land, freed from any legal or equitable lien or interest of the plaintiff. To which the plaintiff excepted. The question is, whether these conclusions are correct.

The agreement of the vendor to sell and convey the premises made with Abiel Stoddard vested in him the equitable title to the land, and made him his trustee of the legal title, while he became the trustee for the vendor of the purchase money. (Story's Equity, 789, 792, 1212; *McKechnie v. Sterling*, 48 Barb., 330; *Moore v. Burrows*, 34 id., 173. This equitable interest in the premises was capable of being mortgaged. *Murray v. Walker*, 31 N. Y. 399). A deed, absolute upon its face, may be shown by parol to have been intended as a security, and if so shown will be held to be a mortgage. (*Clark v. Henry*, 2 Cowen, 327; *Van Buren v. Olmstead*, 5 Paige, 9; *Hodges v. The Tennessee Fire, etc., Co.*, 4 Selden, 416; *Van Duzen v. Worrell*, 3 Keyes, 311.) When the owner of the equitable title directs his trustee of the legal title to convey such title to a third person as security for a debt of the former to the latter, or

as security for any other person, it is obvious that the latter holds title as mortgagee of the former. That he did direct such conveyance for such a purpose may be shown by parol. This is equally as clear as that an absolute deed may be so shown to have been intended by the parties as a security, and therefore a mortgage. Whether the legal title is held by the party wishing to mortgage the land, and the deed, therefore, given by him, or such title held by a third person as his trustee, who conveys the same at his request, does not affect the rule in this respect.

The counsel for the respondent made an able argument to show that the facts found by the referee were not such as to warrant the court's decreeing specific performance of the contract between the defendant and Abiel Stoddard. But this is not the relief sought by the action. That relief is a redemption by the mortgagor of the premises from the mortgagee, and the rules governing cases of specific performance have no application. As was said in *Case v. Carroll* (35 N. Y., 385, by Denio, J.), in equity the relations of the parties were those of mortgagor and mortgagee and the equity of redemption could not be cut off without a strict foreclosure or foreclosure and sale in a court of equity. The way to dissolve such a relation is well settled, and that is, to call upon the mortgagor to redeem or be foreclosed. *It follows, that* from the facts found by the referee, the plaintiff was entitled to redeem; and it appears from the opinion that such was the conclusion of the General Term, but for the obstacles hereafter commented upon. The first ground taken by the General Term was, that there was no seal affixed to the instrument by which Abiel Stoddard attempted to transfer his interest in the premises to his brother, and that for this reason it was void. For this, the learned judge relies upon section 137 (1 R. S., 738). But that section includes only grants in fee, or of freehold estates in land. The interest transferred by Abiel Stoddard to the plaintiff was neither of these estates, but simply an equitable right of redemption. Consequently, the statute has no application to this case. The learned judge also refers to section 6 (2 R. S., 134). That section provides, that no estate or interest in lands, other than leases for a term not exceeding one year, etc., shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agents thereunto authorized by writing. The instrument in question was subscribed by Abiel Stoddard. We have already seen that the interest transferred was not such as to the bring the case within the provisions of section 137 (1 R. S., 738), and that, therefore, a seal was not requisite to the validity of the instrument.

It is further said that the instrument executed by Abiel Stoddard was not sufficient to transfer his right of redemption to the plaintiff.

The language of that instrument is, so far as applicable to this question, "all of my right, title and interest whatever to the land," describing it. This is sufficient to embrace an equity of redemption; and the right to an account of the profits, etc., received by the defendant passed therewith as an incident thereto.

The remaining ground suggested, but not passed upon in the opinion, was, that the instrument purporting to transfer the interest of Abiel Stoddard to the plaintiff was void, for the reason that at the time of its delivery, the defendant was in possession of the land, claiming adversely to the plaintiff. No such fact is found by the referee; but reference is made to the complaint. That states, in substance, that the defendant was in possession, and denied the right of Abiel Stoddard to redeem. No authority is referred to, but I apprehend that the learned judge had in view section 147 (R. S., 739). That provides that every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. But it was not a grant of the lands, out of the equity of redemption, that was transferred by the instrument. (See *Bissel v. Morgan*, 56 Barb., 369.) It follows, that the judgment entered upon the report of the referee, and that of the General Term, affirming the same, must be reversed.

* * *

It must be assumed as proved and found, that Daniel D. Carr had negotiated for and had concluded a treaty for the purchase of the premises from Berry, the original owner, and for his own benefit; that he was able to and did pay a part of the purchase-money; that some or all of the residue was advanced by the plaintiff for and at the request of Daniel D., who thereby became a debtor to the plaintiff for the amount thus advanced; and that in pursuance of the agreement made with Daniel D., and in performance of it, Berry conveyed the premises to the plaintiff, thus vesting the legal title in him in consummation of the equitable title which Daniel D. had under his agreement; and that Daniel D. took immediate possession of the premises, and occupied them as his own, making subsequent payments upon the loan of the plaintiff, and reducing the debt to a small amount, if not extinguishing it altogether; that Daniel D. remained in possession for some nine years and until his death, about 1867; during all which time his rights as the owner, subject only to the lien of the plaintiff for his advances, were acknowledged by the plaintiff, who only claimed as absolute owner, and adverse to Daniel D. after the death of the latter. The property has greatly appreciated in value since the purchase. These facts, which are clearly inferable from the evidence, with the fact found by the jury, *make the plaintiff a mortgagee*. By the transaction *a trust was created in the nature of a mortgage* for the security of the plaintiff, with right of redemption in Daniel D. Carr. It is

well established that a deed, absolute on its face, can be shown by parol or other extrinsic evidence to have been intended as a mortgage, and that the relation of mortgagor and mortgagee being thus established, all the rights and obligations incident to that relation attach to the parties. (*Horn v. Keteltas*, 46 N. Y., 605). The fact once established, either by the terms of the conveyance or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees; and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor, or those claiming under him, until after foreclosure. (*Murray v. Walker*, 31 N. Y., 399; *Clark v. Henry*, 2 Cow., 324). It is not material that the conveyance should be made by the debtor or by him in whom the equity of redemption will exist. It is sufficient if the debtor and he who claims to occupy the position of mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title has and acquired such title by the act and assent of the debtor, and as a security for his debt. (*Stoddard v. Whiting*, 46 N. Y., 627.) In the case cited the plaintiff sought to redeem the premises from the defendant, who had taken the title, upon paying a balance due upon a contract of purchase held by the assignor of the plaintiff who had entered under the contract and paid a part of the purchase money before the arrangement with the defendant, who took the conveyance directly from the original vendor.

But the principle of the case is decisive of this appeal. That the contract was in writing, and the vendee had made partial payment of the purchase money, and was in possession of the premises, only make the two cases to differ, circumstantially, and affect the degree, rather than the character of the evidence to establish the relationship of mortgagor and mortgagee. The purchase here was by the borrower of the money from the plaintiff, and his rights as purchaser were recognized by the seller; the possession of the actual buyer followed immediately upon the purchase, and he paid a part of the purchase money at the time, and became a debtor to the plaintiff for the amount advanced by him. The circumstances are as significant and the equities as palpable as in *Stoddard v. Whiting*; and it needs no extension of the rule there adjudged to declare the conveyance to the plaintiff to have been intended as a mortgage. *Per Allen, J.*, in *Carr v. Carr*, 52 N. Y., 257.

CHAPTER II.

DEBT.

(a.) *Is a Legal Obligation Necessary?*

Lit. sec. 338, and *Co. Lit.*, 209, a., b., p., *supra.* *Floyer v. Lavington.* 1 *Peere Wms.* 268.—1714. Sir Joseph Jekyll, *arguendo.* As to the objection that there was no covenant for the payment of the principal or interest, he said that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz., for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage.*

BUCKLIN v. BUCKLIN.

[1 *Abb. App. Cas.* 242.—1864.]

Olive E. Bucklin brought this action in the Supreme Court against William and George R. Bucklin, to foreclose a mortgage made by their ancestor, William Bucklin, Sr.

William Bucklin, Sr., and his wife, Esther, previous to his executing this mortgage had separated, and she had filed a bill in chancery for a judicial separation (*a mensa et thoro*) on the ground of his cruel treatment of her. In the bill she prayed that he might be compelled to maintain her, and that the custody of their infant daughter, Olive E., might be awarded to her. Upon the bill she obtained an injunction restraining him from molesting the child.

In order to compromise the controversy and stay the prosecution of the suit, the husband, William Bucklin, Sr., agreed to make provision for the support of his wife and the infant, together, and separate from himself, and convey a house and lot to the child within six months.

To effect this settlement the mortgage in suit was executed to Vedder Green (who appeared as the next friend of the wife in her divorce suit) and was expressed to be made to him in trust for the wife and infant daughter.

*See also *Howel v. Price*, *id.*, 291, and 2. *Atk.* 496.

The mortgage, which was set forth in the complaint, recited the above facts, and after providing for the said support of the wife and daughter, and the suspension of proceedings in the suit, without modification or discontinuance, the mortgage contained the following language: "Now, for the purpose of securing the performance by the said William, of the aforesaid agreements and covenants on his part to be performed, this indenture witnesseth—that the said William Bucklin, in consideration of the premises, and also on consideration of the sum of one dollar, paid to the said William by the said Vedder Green, the receipt of which sum is hereby confessed and acknowledged, hath granted, bargained, sold," &c., "and doth grant," &c., to Vedder Green and his heirs and assigns forever (here was inserted the description of the lands; habendum to him, his heirs and assigns, forever), "provided, that if the said William Bucklin shall within the period of six months convey to Olive Esther Bucklin real estate of the value of one thousand dollars, to consist of a dwelling," &c., and if he shall permit Esther to occupy the same without molestation, and if he shall pay to Esther Bucklin three hundred dollars annually during their joint lives, and shall permit the said Esther Bucklin to have the custody, management, &c., of said Olive Esther Bucklin, without any interference on his part (and if he should also perform certain other conditions relating to personal property), then this indenture shall be void. And it is hereby declared that this mortgage is given to Vedder Green in trust for the benefit of Esther Bucklin and her infant daughter, Olive Esther Bucklin. And in case the above conditions on the part of said William, or any of them, shall be broken, and it shall at any time hereafter be necessary to enforce this mortgage, the amount that shall be recovered on said mortgage shall be recovered for the benefit of the said Esther and her infant daughter or the survivor of them.

The complaint then averred that Bucklin, Sr., wholly failed to convey land and dwelling, &c., as he agreed (though payment of the annuity was admitted), and demanded judgment for the foreclosure of the mortgage for the sum of one thousand dollars, the value of the land and dwelling promised to be conveyed, and interest, &c.

When the mortgage was made, in 1836, the child (the present plaintiff) was about three years of age. The trustee, Vedder Green, died in 1841, the husband and wife died in 1843 and 1844. In 1857, the daughter, coming of age, procured an order of court appointing her to enforce the trust and bring an action in her own name.

The defendants were heirs of the mortgagor in possession.

The judge before whom the cause was tried sustained the mortgage; found that the husband and wife never afterward cohabited, though for a short time they resided in the same house, and he

gave judgment for plaintiff with interest from the date of the mortgage.

The Supreme Court, at General Term, affirmed this judgment, holding that this was an action on a sealed instrument, and, if the cause of action had accrued after the Code of Procedure went into effect, it would have been governed by section 90 of the Code, but that as it had accrued before that time, it was governed by 2 R. S., c. 8, tit. 3, art. 1, Sec. 9, which enacts that the time which shall have elapsed between the death of any person, and the granting of letters testamentary or of administration on his estate, shall not be deemed any part of the time limited by any law, for the commencement of actions by executors or administrators. That had the trust descended to the personal representatives of the trustee, this cause of action would have been saved from the operation of the statute; and that the *cestui que trust* should not be prejudiced by having the trust fall on the court of chancery, as it did on the death of Green, but that an analogous rule should be applied, and the whole term of twenty-one years allowed in which to bring the action, which would prevent it from being barred.

From that judgment the defendants appealed to this court.

By the Court.—Denio, Ch. J.—The mortgage, so far as it is now sought to be enforced, was created, among other objects, to secure the plaintiff, then an infant of tender age, a portion of her father's property, to aid in her maintenance during her infancy, and to furnish her with a small independent estate in real property. The differences which had arisen between her parents presented the occasion for this gift; but its validity did not depend upon the merits of that controversy, nor yet upon the legal effect of the agreement for a separation between her father and mother, nor upon the legality of the provisions made by the former for the latter. The contract, so far as it relates to that provision, has either been performed or it is now incapable of performance. The party entitled to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such an interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.

Where the rights of creditors do not stand in the way, and there appear not to have been any in this case, it is perfectly lawful for a parent to make such provision out of his estate for a child or children, by present, gift or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based on a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgage. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. The instrument executed by William Bucklin, to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land, and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant; but for all substantial purposes it has the effect of a deed of bargain and sale. 1 R. S., 738, 739, Sections 137, 138, 142. At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is, of course, a technical view of the nature of a mortgage.

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor only.

But the defendants' position is formal also. They insist that courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to sustain that position. *Duvoll v. Wilson*, 9 Barb., 487, and cases cited; but see *Souverybe v. Arden*, 1 Johns., Ch. 240, 266, and cases referred to by Chancellor Kent. If the settlement be an executed one, like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of the land, but yet, in point of form, an equity. The mortgagor may, it is true, come into a court of equity to enforce his mortgage, as the mortgagee must in order to redeem. The reason why a mortgagee must resort to equity is not because the mortgage is an executory transaction, and requires the aid of a court of chancery to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase, "once a mortgage always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute

foreclosure. Formerly, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possession without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagee. *Mickles v. Dillage*, 17 N. Y., 80; *Mickles v. Townsend*, 18 *Id.*, 575. The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of being remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

A point is made that the mortgage is invalid because made to Green as a trustee, he confessedly having no beneficial interest, and because the purposes of the trust are not such as are contemplated by the fifty-fifth section of the chapter of the Revised Statutes relating to uses and trusts. Now, although for the purpose of showing that a mortgage is an executed conveyance, and not a mere executory agreement, I have recurred to the legal nature of that instrument as a conveyance of the land mortgaged, I am not prepared to concede that it should be regarded as "a disposition of the land by deed" within the meaning of the article of the Revised Statutes respecting uses and trusts. 1 R. S., 727. The modern idea of a mortgage is a pledge of the land to secure the payment of money. The statute relates to interests in lands, properly so called, and not to collateral pledges made for the purpose of securing interests in personalty. Debts secured by mortgage are declared to be personal assets and go to the personal representatives. 2 R. S., 82, Sec. 6, subd. 8.

A trust of personalty is not within the statutes of uses and trusts, and may be created for any purpose not forbidden by law. This mortgage is not, therefore, at all within the influence of the fifty-fifth section, or within the one which abolishes uses and trusts. But if it were otherwise, and if the interest in the land conveyed by a mortgagor to a mortgagee were regarded as within the purview of that section, the only effect in this instance would be to annihilate the title and strike out the name of Green, the trustee, and to invest the beneficiaries with the title nominally conferred on Green. This effect is produced by section 49 of said article, which declares that if a disposition of land be made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee; and section 47, which confers upon the beneficiary in such cases an estate of the same quality as his beneficial interest. Again, a trust may, by section 55, also be created to sell lands for the purpose of satisfying any charge there-

on. This does not require a pre-existing charge. One created at the same time and by the same instrument which contains the conveyance would be sufficient to bring the disposition within the terms and spirit of the section, and would embrace the case of a mortgage.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands to the value of one thousand dollars to and for the benefit of the plaintiff. *

BAIRD v. BAIRD.
[145 N. Y. 659—1885.]

Appeals from judgment of the General Term of the Supreme Court in the Fifth Judicial Department, entered upon orders made October 2, 1894, which affirmed judgments in favor of defendants entered upon decisions of the special county judge of Monroe county on trial at Special Term, dismissing the complaint in each action.

The following is the opinion:

Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year, his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5,000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2,500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1,500 each on the farm. No bond was given and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages the testimony tended to show, and the trial court found, that

*See also *Matthews v. Sheehan*, 69 N. Y. 585, 591, s. c. page 19 *supra*.

*Compare *Kina v. Green*, 6 Allen, 139 (a case of *pledge* to secure an illegal demand), and *Maggs v. Ames*, 4 Bing. 470 (a case of *guarantee* of the obligation of a married woman).

they were not intended to secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird and mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases, may, therefore, be conveniently considered and disposed of as one.

"The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in place of her husband and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt. That, in fact, there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient, and the fact is not open to question or review here.

"The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied. (*Davis v. Bechstein*, 60 N. Y., 440; *Hill v. Hoole*, 116 id., 299; *Briggs v. Langford*, 107 id., 680; *Thomas on Mort.*, Sec. 847; *Jones on Mort.*, Sec. 1297.)

"The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive

against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause or the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be varied by parol proof to the contrary, but that rule was gradually abandoned, and now that clause is open to parol proof. (*McCrea v. Purmot*, 16 Wend., 460; *Hebbard v. Haughian*, 70 N. Y., 54; *Ham v. Van Orden*, 84 id., 269.) So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as defense. (3 R. S., (5th ed.,) 691, sec. 77, 78; Code, sec. 840).

There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be varied by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope on practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any farther, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment. (*Reynolds v. Robinson*, 110 N. Y., 654; *Blewitt v. Boorum*, 142 id., 357; *Andrews v. Brewster*, 124 id., 433.) So,

also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case.

"It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were, in fact, executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful or practicable or possible or the contrary is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery, and no other. Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money.

"We think there was no error in the result and that the judgments should be affirmed with costs."

O'Brien, J., reads for affirmance.

Bartlett, J., concurs; Peckham and Gray, JJ., concur in the result; Andrews, Ch. J., dissents; Haight, J., not sitting.

Judgments affirmed.

N. Y. REAL PROP. ACT. § 214. *Covenants in Mortgages.*

A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage.

SHAW v. CARPENTER.

[54 Vt. 155—1881.]

[Petition to Foreclose a Mortgage.]

Royce, Ch. J.—This cause was heard upon the report of a special master appointed to ascertain and report the amount due on the mortgage described in the petition.

It appears from the report that on the 24th day of July, 1872, one Benj. D. Peterson, who was then engaged in the business of bottling cider, soda and mineral waters, at the City of Burlington, sold the good-will of the business and all his stock—tools, bottles, machinery and fixtures—then in use by him in said business, as specified in certain inventories, which were signed by the said Peterson, to the defendant, Carpenter.

Upon said inventories the various articles sold were separately carried out with a separate price for each item. The footings of the separate pages were brought forward upon the last page, where the aggregate correctly appeared of the sum \$3,221.81. To this

amount an item of \$116 was added, which was included in the note first due. It is not found what the consideration for that item was. The good-will of the business was included in the sale and was not estimated in the inventory. It is probable that it may have been estimated by the parties at that time. For the amount so ascertained the defendant, Carpenter, executed four promissory notes payable to said Peterson or order, and secured the same by the mortgage sought to be foreclosed. Said notes have all been paid but the last, which was for \$800, and that fell due on the 24th of July, 1876. The interest on that note was paid to the 24th of July, 1876.

On the 28th day of October, 1872, and before the maturity of any of said notes, Peterson sold them and the mortgage for an adequate consideration to the petitioner, the petitioner, then believing the notes to be based on a valid and legal consideration and not suspecting that any illegal element entered into the consideration.

Of the property sold by Peterson to Carpenter, and which formed apart of the consideration of said notes, the master has found there were the following goods, in kind and amount: Lager beer, \$23.94; Cider, \$422; Ale, \$209.38; Porter, \$6.72; Alcohol, \$2.25.

The defendant Carpenter claims that if any part of the consideration for the notes was illegal, they are void; that no recovery could be had upon them, and that a court of equity cannot grant any relief to the petitioner.

The first inquiry is, was the sale of any of the articles above enumerated prohibited by law? It is found that the lager beer was not an intoxicating drink, and its sale was not then prohibited, the act forbidding its sale having been passed in 1878. The sale of the cider was not illegal, unless the place where it was sold was a place of public resort.

The sale of the ale, porter and alcohol being illegal, the consideration for the notes, as far as the value of those articles went to make up the amount for which the notes were given, was an illegal consideration.

The important question in the case is, as to the effect that such partial illegality of consideration is to have upon the rights of the parties. *Robinson v. Bland*, administratrix of Sir John Bland, 2 Burr., 1077, has always been regarded as a leading case, and opinions were given in it by Lord Mansfield and Justices Denison and Wilmot. The declaration contained three counts: The first, upon a bill of exchange; the second, for money lent and advanced; and the third, for money had and received. A verdict was had for the plaintiff for £672, the amount of the bill of exchange. It was found that the consideration for the bill of exchange was £300, lent by the plaintiff to Sir John Bland at the time and place of play, and £372 were lost at the same time and place by Sir John Bland to the plain-

tiff at play. It was held that the £372, part of the consideration for the bill, being for money lost at play, could not be recovered, all such securities being void under the statute, and that a part of the consideration for the bill being illegal, no recovery could be had under the first count; that the plaintiff was entitled to the £300 lent, and was allowed to recover it, under the count for money lent and advanced.

Judge Denison says there is a distinction between the contract and security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security. That, being entire, is bad for the whole.

Judge Wilmot: "As to contracts being good and the security void, the contracts may certainly be good, though the security be void."

The same principle as to such a security being void was enunciated in *Scott v. Gilmore*, 3 Taunt., 226. See also, *Yundt v. Roberts*, 5 Serg., and Rawle, 139; *Phillips v. Cockayne*, 3 Campbell, 119; *Edgell v. Stanford*, 6 Vt., 551. These two first cases have oftenest been quoted as authority for the rule that has generally prevailed in the English and American courts, that where a part of the consideration for a security is illegal the whole security is void.

The notes which were given for the good-will and property sold to Carpenter were all infected with illegality, and the defense of illegality attached to all of them; so that if what is now claimed as a defense can be allowed, if proceedings had been instituted to compel payment before anything had been paid, the entire claim could have been defeated, notwithstanding Carpenter had received and was in the enjoyment of the property, upon the ground that the portion of the property above enumerated was illegally sold. It has somewhere been said that the declaring such a security void was to be regarded as a punishment of the party for having made an illegal contract.

The loss of property illegally sold would generally be considered a sufficient punishment, certainly, when the sale was only *malum prohibitum*, and no wrongful intention appears. But a court of equity could never hold that one might be deprived of his entire fortune, because, in the consideration agreed to be paid for it, there was intermingled some article the sale of which was prohibited.

We regard the case of *Carlton v. Woods*, supra, as sound law and well sustained by authority. Its application works out just and equitable results, and we shall apply the principles there enunciated in the decision of this case.

Peterson could have recovered against Carpenter in an action of *assumpsit*, for all that was sold to him, except the ale, porter and alcohol. The mortgage would be treated as security for the debt due from Carpenter, on account of the property legally sold to him. Peterson might have foreclosed the mortgage, and thus have compelled payment of the debt.

The petitioner, by his purchase of the notes and mortgage, acquired all the rights, legal and equitable, of Peterson. He could maintain a suit at law for his own benefit, in the name of Peterson, or a partition in equity, as assignee of the mortgage, to foreclose it. And in the disposition of such a petition it is the duty of a court of equity, which has been said to be the great sanctuary of plain dealing and honesty, to compel the payment of that portion of the debt that was secured by it, that was legally and fairly contracted.

Dissenting opinion was delivered by

Ross, J. I am unable to concur in the decision of the court in this case.

A part of the consideration of the note being illegal, the note is void and no action can be maintained thereon to enforce its collection. To the cases cited by the court, in the main opinion, may be added *Cobb v. Cowdery et. al.*, 40 Vt. 25; *Bowen v. Buck*, 28 Vt. 308. In *Cobb v. Cowdery*, *supra*, the distinction is taken between a consideration in part void, in part illegal. The note failing, what is there left for the mortgage to stand upon? The mortgage is but an incident to the debt it secures. On the authorities cited by the court in support of its decision, as well as all the reasoning, partial illegality of consideration avoids all securities. The note was a security, or evidence of the debt, of a higher nature than the original contract. The latter was merged in the note. The note in suit, and all the notes secured by the mortgage, were tainted by illegal consideration entering into them. Each note being an entire contract of itself, no division of the legal from the illegal part of the consideration could be effected. Courts established for the enforcement of law, will not give aid or countenance to anything illegal: nor, where the illegal is commingled with the legal, will they aid in separating or purging the former from the latter. Their proper function is to establish and enforce the legal and to condemn and punish the illegal. Where a part, however small, of the consideration of an entire contract is illegal, the whole contract is tainted, and courts will not compel its performance. *Collins v. Blanton*, 2 Wils. 341, is a leading case on this subject, in which the Lord Chief Justice Wilmut uses the quaint but forcible and often quoted language: "You shall not stipulate for iniquity; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul! O procul este profani.*" The mortgage is an entire contract. Its consideration was the notes, the payment of which was therein secured; every one of which was tainted with an illegal consideration in part. It was not given to secure the performance by Carpenter of his contract with Peterson, of July 24, 1872, by which he purchased his business and stock in trade,

but was given solely to secure the payment of the notes which were executed in payment of that purchase. If the action were upon the notes, it is conceded that no recovery could be had; because every one of them is tainted with illegal consideration. The illegal could not be separated from the legal portion of the consideration, and an enforcement of the collection of the notes would be the enforcement of an illegal contract. How does it differ when the mortgage, which is but an incident to the notes, is allowed to be foreclosed? Is it not an enforcement of an illegal contract? To foreclose the mortgage for the legal part of the consideration must not the illegal portion be ascertained and rejected, which the majority hold could not be done, if the action were upon the notes? What is the foreclosure but an action upon the notes described in its condition? And to ascertain the legal part of the consideration of the mortgage must not the notes be treated as divisible? I can see no other means of separating the legal from the illegal part of its consideration.

It may well be admitted that a mortgage, given to secure the payment of several notes, or debts, a part of which arose out of wholly legal transactions, and a part of which were tainted with illegality, could be enforced to compel the payment of the former alone. In such a case the orator would not have to show in evidence, nor rely upon anything illegal, in maintaining his suit. In the language of Gibbs, Ch. J., in *Simpson v. Bloss*, 7 Taunt. 246, in speaking of *Faikney v. Reynous*, 4 Burr. 2069, and *Petrie v. Hannay*, 3 Term. Rep. 418: "The ground of their decision was, that the plaintiffs required no aid from the illegal transaction to establish their case." This, as I understand, is the test most frequently applied in this class of cases. If the plaintiff can show a good cause of action, independent of and without bringing into the case anything illegal, either by way of proof or otherwise, he may maintain his action therefor. If, on the other hand, he derives any aid from the illegal part of the transaction, by being obliged to show it to make out the legal part, or otherwise, he must fail. The court will not allow the unclean thing within the temple of justice. In the foreclosure of his mortgage the orator was bound to show in proof his notes, every one of which was tainted with illegality; and for that reason the notes all fall, and the mortgage given to secure them alone, falls with them. This point my brethren have not deemed worthy of their attention, nor alluded to. But if I am in error on this point, I cannot concur with my associates in holding that the original contract is divisible.

The contract is to be construed as a whole. Thus construed, it is an entire, indivisible contract. It was a sale of a business, as a going concern, including the good will, stock in trade, machinery and fixtures. It is not to be inferred, or intended, that Peterson would have sold the good will of the business, without selling the

stock in trade, machinery and fixtures, nor that Carpenter would have purchased the latter without the former. It was not the sale of the good will as one separate transaction, of each bottle, barrel, and fixture as another separate transaction, and so divisible. But one consideration is named or paid; and but one thing is sold—the business, including the stock, &c., and good will as a going concern. As said by Devens, J., in *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91: “If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire.

Carleton v. Woods, 28 N. H. 290, comes nearer to supporting the decision of the majority of the court, but, in my judgment, is distinguishable from the case at bar. It is there distinctly held that if the contract is entire, and part of the consideration is illegal, the contract is void; but that where an entire stock of goods is sold, at one and the same time, but each article for a separate and distinct and agreed value, the contract is not to be regarded as entire and indivisible. The sale was for cost and freight, and *Woods, J.*, says: “We are unable to see how this case differs from the case of a sale by a merchant of various goods to his customers, at one and the same time, for separate values, stated at the time, which, when computed, would, of course, amount to a certain sum in the aggregate.” It was on this theory that the court held that, although the notes could not be maintained, because a part of the consideration was for spirituous liquors illegally sold, yet, on the general counts in assumpsit, for goods sold and delivered, the plaintiff might recover for the goods sold, as the court held, independently of, and as transactions separate from, the purchase of the liquors. To say the least, this was pressing the doctrine of divisibility of a contract to the extreme verge, and I am unwilling to go further. There may have been more in the case than appears in the report, justifying the holding of the court. On the facts stated, I think the authority is clearly against that contract being divisible. That case, however, lacks the element of being the sale of a going business, including the good will, and does not appear to have been reduced to writing. In my judgment, the decree of the Court of Chancery should be reversed, and the cause remanded, with a mandate to enter a decree dismissing the bill with costs.

(b.) *Obligations dehors the mortgage.*

COLEMAN v. WINCH.

[1 *Peere Wms.* 775.—1881.]

A. seised in fee of lands makes a mortgage to B. for £100, and afterwards borrows £100 more of B. upon bond, and dies: the heir-at-law conveys the inheritance and equity of redemption of the premises to trustees, in trust for payment of all the bond and simple contract debts of his father equally: after which the trustees bring their bill to redeem B., who insists on being paid his debt by bond, as well as that by mortgage: and for the mortgagee it was objected:

First, That as he had the estate at law absolutely, and the trustees could not come at it without the interposition of equity, it seemed not agreeable to reason, that he should be hindered by this court from receiving what was due to him by bond as well as by mortgage, the former being as just a debt, and as much due in conscience as the latter.

Secondly, That if the heir had brought a bill to redeem the mortgage, it was plain he must have paid as well the bond debt as that by mortgage; and if the heir must have paid it, why should any one claiming under him be in a better condition than he himself?

Lord Chancellor: The bond of the ancestor, wherein the heir is bound, becomes upon the ancestor's death the heir's own debt, for which he is suable in the debit and detinet; and therefore if he comes to redeem the mortgage made by his ancestor, he must pay the debt by bond, as well as that by mortgage; but though this be the debt of the heir, it cannot be said to be due from the heir's assignee, the bond being no lien upon the land: which appears most plainly, in that it was no lien on the land even against the *mortgagor himself, who happened to be indebted to the same person by mortgage and by bond. Suppose one be indebted to A. by mortgage for a term for years, and also indebted to him by bond: if on the death of the mortgagor, his executor brings a bill to redeem the mortgage, he must pay both; but if the executor assigns over the equity of redemption of the mortgaged term, and the assignee of the executor brings a bill to redeem, he shall only pay the mortgage money. So if the testator being possessed of a term mortgages it to A., and becomes also indebted to A. by simple contract and dies, his executor bringing a bill to redeem, shall pay both the mortgage and the debt by simple contract, because the very equity of redemption is assets to pay simple-contract debts; but if any creditor of the testator brings a bill to redeem this mortgage, he shall pay only the mortgage.

Lord Chancellor farther said, that the law of England, in suits against heirs, imitated the civil law; where an heir sued by a bond creditor is sued as for his own debt in the debit and detinet, and is prima facie supposed to have assets, but that the heir might discharge himself by saying, that at the time of the writ brought he had no assets, or, if he has assets descended, may show those assets, of which the plaintiff may, if he pleases, take judgment; and that in case the heir had aliened before action brought, though at law there was no remedy against him, yet in equity he was responsible for the value of the land aliened; but now the heir is made liable at law for the value of the assets he has aliened.

* *Quaere tamen*: for in the case of *Baxter versus Manning*, 1 Vern. 244, it was decreed by Lord Keeper North that where the mortgagee lent more money to the mortgagor on bond, the mortgagor should not redeem without paying the bond debt as well as the mortgage; and yet, in the case of *Challis v. Casborn*. Precedents in Chancery ⁴⁰⁷, it was laid down by the counsel for a rule, and agreed to by Lord Cowper, that the mortgagor himself is in such case to be let into a redemption upon payment of the mortgage money only; though possibly there may be some difference, as to the rule of the court, between a mortgagor's coming to redeem and a mortgagee bringing his bill to should be foreclose.

EX PARTE HOOPER.

(1 *Merivale*, 7.—1815.)

ASSIGNMENT, by the Bankrupts, of Leasehold Premises, by way of Mortgage, for securing the sum of £400 and interest.

The bankrupts subsequently becoming indebted to the Mortgagee in further sums received by them for his use, an account was stated and settled between the parties, on which a balance of £400 was ascertained, and the following memorandum delivered:

“Hewett and Hopkins, debtors, to Mr. F. Ford, £400 on balance of account due the 12th day of June, 1813.”

The bankrupts farther entered into a parol engagement that the last mentioned £400 should be tacked to the original mortgage; and that, as soon as a new lease of the premises could be obtained, a mortgage security for the same should be executed by the bankrupts; but which, owing to the renewal not having been obtained, was never done.

Interest was paid on both sums to the 12th of June, 1814; and on the 8th of December following the commission issued.

The petition prayed a sale of the mortgaged premises, and that, after applying £800 in liquidation of the debt, the residue might be proved; with the usual directions.

The single point before the court was, whether or not the petitioners were entitled to tack on the second £400 debt to their mortgage security.

The petition came on to be heard before the long vacation, when the Chancellor, having expressed himself adverse to the prayer, it was requested that it might stand over, and was this day re-argued.

THE LORD CHANCELLOR:

There is an evident distinction between the cases of loan and purchase; and without expressing any opinion on the question, whether, in the former case, payment of the whole, or of part of the purchase money, is, or is not, a part performance to take it out of the statute, it is enough to say that the advance of money upon a contract for loan affords, of necessity, no evidence of any intention but that of creating the relation of debtor and creditor.

The doctrine of equitable mortgage by deposit of title-deeds has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, that doctrine is not to be further enlarged. In the present case, the legal estate has been assigned by way of mortgage. The mortgagee is not entitled to say, “I hold this conveyance as a deposit;” because the contract under which he holds it is a contract for conveyance only, and not for deposit. The subsequent memorandum in writing creates nothing more than a debt by simple contract, and cannot be added to by parol.

The cases on this subject have gone too far already; and I would be understood as saying that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction. *The petition dismissed with liberty to file a bill.*

LEE v. STONE, 5 Gill. & J. 1.21. The opinion of Dorsey, J., is in part as follows, viz.:

"It has been further contended that the appellants are to be first paid, as well the balance due them from Key, as that which appears on the auditor's account; Booth, as the security, being answerable for the defalcations of the guardian; that the appellants being seised of the legal estate in the land sold, their legal title could not be taken from them until they were paid, not only the remaining balance of the purchase-money upon whatever account due from Booth to them, and this pretension is rested upon the familiar principles of equity, "that he who seeks equity, must do equity; and that a multiplication or circuity of action should be avoided."

But these principles have never been carried to the extent, that would be necessary to their affording relief to a party in the predicament of the present appellants. They stand here in the character of complainants seeking to enforce their lien, for a balance of the purchase-money, by a sale of the premises on which their lien attaches; and require this Court not only to enforce their lien, but to tack it to another debt, apart from which their application is entitled to no priority over other creditors; and this to the exclusion of another creditor before the Court, whose debt is secured by a lien on the premises. If there be any case to warrant this requisition, it has not been presented to our notice in the argument, and has certainly escaped our researches upon the subject. It is true, that if a mortgagor goes into chancery to redeem, upon the axioms of equity above mentioned, he will not be permitted to do so but upon payment, not only of the mortgage debt, but of all other debts due from him to the mortgagee. In this there is no prejudice to the rights of others; nobody has a right to complain; no injustice is done to anybody

But it is also true, that if the mortgagee seek a foreclosure in chancery, the mortgagor will be permitted to redeem, upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally clear that if a subsequent mortgagee, or judgment creditor, file a bill to redeem, he will be permitted to do so upon the payment of the mortgage debt alone. Whilst these well-settled principles of equity remain unshaken, upon no system of analogy or consistency can the claim of the appellants be gratified. Their doctrine is, in effect, simply this, that in all cases where the sale of the real estate of a deceased debtor is decreed, the debts due to the heirs at law, to whom such estate has descended, be their nature what they may, must first be paid, even to the exclusion of judgment creditors. To such a length the doctrine of tacking has never yet been carried.*

*To *Scripture v. Johnson*, 3 Conn., 211 (1819), it is said: "There is no doubt as to the right of the plaintiff (mortgagor) to redeem the whole of the premises mortgaged; but as he who will have equity must do equity, it must be on condition not only of paying the sum charged upon the land, but the debt collaterally due to the mortgagee."

Darrow v. Kelly, 1 Dallas, 142 (1785), is contra.

STODDARD v. HART.
[23 N. Y., 556.—1861.]

Appeal from Supreme Court. The action was to restrain the foreclosure by advertisement, and to compel the cancellation of a mortgage held by the appellant against one Spicer. The trial was before a referee, who found these facts: On the 4th of March, 1852, Spicer procured from the defendant, on the security of the bond and mortgage in question, an advance of \$200 on lumber to be thereafter furnished. The mortgage was recorded on the 8th of March, 1852.

The original condition of the bond and mortgage was for the payment of \$200 and interest on the 15th of June, 1852.

At the time the \$200 was advanced, it was agreed by the parties that if Spicer should want more money, the defendant would advance it, and for the purpose of securing it, the amount of such further advance should be inserted in the bond, with the parol agreement that the mortgage should be considered as security for what was thus inserted.

Accordingly, within ten days after the mortgage was given, Spicer applied for and obtained from the defendant a further advance of \$180, inserting at the same time in the bond a further condition for the payment of that amount, with interest, on the 1st of June, 1852.

The mortgage, which had been in the meantime recorded, was conditioned for the payment of \$200 and interest, with the additional clause: "According to the condition of a certain bond obligatory bearing even date herewith."

On the 12th of July following, Spicer was indebted to the respondent, Stoddard, in the sum of \$500, for rent due and to become due, and with full and specific information from Spicer of all the foregoing facts, Stoddard took a subsequent mortgage on the premises for the amount of his debt; and afterwards, in January, 1853, he obtained from Spicer a deed of the property, which was received in satisfaction of his mortgage.

On the 25th of February, 1863, the defendant commenced a foreclosure by advertisement, claiming the amount due to be \$380, with interest. The plaintiff, on the 1st of March, tendered as the amount due, the sum of \$200, with interest and costs, and demanded a satisfaction piece, which the defendant refused.

The referee decided that the defendant had no lien on the premises except for the \$200 and interest, and that the mortgage should be cancelled on payment of that amount, with costs.

The judgment entered upon the referee's report was affirmed on appeal at general term in the Eighth District, and the defendant appealed to this court.

John K. Porter, for the appellant.

E. Peshine Smith, for the respondent.

COMSTOCK, CH. J. In a loose and general sense the equity of this case is on the side of the defendant, because he made the subsequent advance of \$180, it being agreed that this, as well as the

original sum of \$200, should be considered as secured by the mortgage. The question, however, is, whether the rules of law will give that effect to the transaction.

It will be convenient first to determine the legal construction and effect of the mortgage, unaided by the parol facts, but read in connection with the bond to which it is collateral. On the part of the defendant it is contended that the two instruments, constituting, as they do, a single security, are to be read as one; and, therefore, that the new advance, being written in the condition of the bond, is it to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the intrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for \$2,000 actually loaned, and a mortgage collateral thereto be given for \$1,000, the latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, of specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt; the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specifically pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay the \$200, and the further sum of \$180; while that of the mortgage is only to pay the \$200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagor or any one claiming under him not having the rights of *bona fide* purchasers. The title being conveyed by the instrument, the equities of the parties might be adjusted or modified by any new agreement without a writing. But it is entirely settled with us that such is not the nature or effect of a mortgage. With us a mortgage is not a lien or security only, and not in any sense a title. (*Kortright v. Cady*, 21 N. Y., 343, and cases cited.) This ground of sustaining the defendant's lien for the additional advance, therefore, cannot be maintained. The defendant has no title to the land in question;

and we have already seen that he has no legal mortgage for a greater sum than \$200.

At the commencement of this suit the defendant was proceeding to foreclose his mortgage, by advertising to sell the premises under the power of sale contained in the instrument; and he claimed in his notice both the sums of money in question. The plaintiff, before instituting the suit, tendered the sum of \$200 secured by the mortgage, according to its terms, with the interest, and the costs which had accrued. From what has been said, it follows that this tender extinguished the lien and power of sale, and that a sale afterwards made under the power would be a nullity. (*Kortright v. Cady, supra.*) Of course, we now speak of the lien as a legal one, expressed in the mortgage, and having no other existence.

It is claimed, however, that the defendant acquired some equitable lien or right to charge the new advance upon the land, and that, although such a lien or right cannot be enforced in the manner attempted, because there is no legal power of sale to enforce it, yet, as the plaintiff asks the interference of a court of equity, he must do all that equity requires as the condition of relief; in other words, he must offer to pay the whole debt in specie to the plaintiff. The argument may be sound if the defendant did acquire any such equitable title or right; and this is the next subject of inquiry.

In England it has long been held that a deposit of title deeds by a debtor with his creditor is evidence of a valid agreement to give a mortgage, which agreement is enforced by treating the transaction as an equitable mortgage. It has always been admitted by English jurists that this doctrine contravenes the statute of frauds, although it has become well settled in the jurisprudence of that country. (4 Kent. Com., 151.) It is confined there to the precise case of a deposit of title deeds. A mere parol agreement to make a mortgage, or to deposit deeds, does not create an equitable lien. In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner. Equity, however, here as well as there, does sometimes specifically enforce parol agreements which are within the statute of frauds; and I see no reason to doubt that such an agreement to make a mortgage may be enforced when money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse the relief. But, in the present case, the precise difficulty is in the absence of any such agreement. The defendant had loaned \$200, and held a mortgage for that amount. He then advanced another sum; but there was no agreement to make another mortgage, or to change, in any respect, the terms of the one already made. The additional sum was inserted in the bond, with an understanding thereby that the mortgage should be "considered" as a security for that sum also. The instrument, as it was made, was a plain security for \$200; and no change in its terms was contemplated. Nor is there the least pretence that any writing was to be executed creating a special security for the new advance. Now, a loan of money, with a mere understanding that the land of the borrower is a security for the debt, does not create a mortgage, legal

or equitable. If it be specifically agreed to execute a legal mortgage, a very different question arises. The deposit of title deeds is evidence of such an agreement. But here there was no agreement to do anything which was not actually done. Consequently, if enough was not done to create a mortgage, then none was created. There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did; but nothing in the transaction was left unfinished of which equity can now decree the complete execution. The question, then, is upon the legal interpretation and effect of the acts done, which, as we have seen, failed to create a lien. The understanding and belief of the parties do not change the law.

For analogous reasons I do not see that the defendant can derive any aid from the doctrine of reforming contracts in equity. If a writing does not truly express the agreement of the parties; if anything was omitted which was agreed to be inserted; or if anything be inserted contrary to their intention, equity will relieve against the mistake by reforming the contract. But in this case no mistake is alleged or proved. Everything agreed upon was done. The subsequent advance of money was to be inserted in the condition of the bond, and it was inserted accordingly. There was no agreement to make a new mortgage, or to change the terms of the existing. It is said the understanding of the parties was that the mortgage should secure this advance also; but if it is not pretended that this understanding was to be expressed in any form of writing. If A. should loan money to B., and take a bond with the understanding that the farm of the latter should be considered a security, but with no intention or agreement to make a mortgage or writing of any sort, as the law requires, in order to create a lien, none would be created at law or in equity. The transaction, in judgment of law, would amount simply to a loan upon the bond of the borrower. Such, I think, in substance, was the transaction in question. There was no mistake, unless it be in misunderstanding the legal effect of what was said and done. But even this is not alleged. It is not stated or proved that the parties believed or understood that the insertion of the new loan in the bond had the effect in law of enlarging the mortgage also.

Will a court of equity, then, make a new contract for parties in order to effectuate a mere understanding where no agreement is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud or misplaced confidence? To do so, I think, would be taking a step in advance of the settled rule on the subject, especially if the relief sought be in direct opposition to the statute of frauds. In the case of *Ilunt vs. Rousmaniere's Executors* (1 Peters, 1), the general intention of the parties was to effect a security upon a ship at sea equivalent to a mortgage or bill of sale. With that design, a power of attorney to sell was executed, which, as they understood and were advised, accomplished the object in view. As a power merely, the instrument was revoked by the death of the party who assigned it, and a bill was filed to reform the writing so that it

might stand as a security according to the intention. It was adjudged, in the Supreme Court of the United States, upon the fullest consideration, that the bill could not be maintained—the ground of decision being that the court could not make an agreement of a different tenor and effect from the one which the parties themselves had intentionally entered into. The case before us seems to me still weaker in its circumstances, because not only was there no agreement for a better security than the defendant actually received, but it does not even appear that he acted under any mistake as to the legal effect of the transaction. The new advance of money was inserted in the bond; but there is no pretence of a belief that this in any respect affected the mortgage. There was a parol agreement that the mortgage should be considered as a security also for the sum thus inserted. The other party might give effect to this agreement in any suit or proceeding against him to foreclose, if he voluntarily chose to do so. But it is not alleged that, under a mistake even of the law, this agreement was supposed to be of any binding force or effect. On the whole, I am of opinion that the defendant's lien, whether viewed at law or equity, was only for the original sum of \$200, and, consequently, that the judgment of the court below is right.

Davies and Mason, Js., dissented; Hoyt, J., did not sit in the case.
Judgment affirmed.

(c.) *Future Indebtedness.*

YOUNGS v. WILSON.
[27 N. Y., 351.—1863.]

Appeal from the Supreme Court. Action to foreclose a mortgage. The complaint set forth a bond, executed by Moses W. Eastman to George Youngs and Abel Hunt, bearing date June 4, 1849, in the penal sum of two thousand four hundred dollars, with a condition similar to that of the mortgage next mentioned.

It also set forth a mortgage, bearing the same date and between the same parties, by which Eastman conveyed to Youngs and Hunt certain lands in Yates county, which were particularly described, which conveyance was made subject to the following condition, viz.: "That if the said Moses W. Eastman shall well and truly pay, and save harmless, and indemnify the said George Youngs and Abel Hunt, and each of them, of and from all liabilities which they, or either of them, may have at any time heretofore contracted to and for the said Moses W. Eastman, either as surety, indorsers or guarantors, or otherwise, whether now due or yet to grow due, and shall save harmless, the said George Youngs and Abel Hunt, and each of them, of and from all damages, costs and charges on account of the same," then the conveyance was to cease; but in case "default should be made in the payment of all or any part of the said liabilities, as the same should become due," the lands were to be sold and the amount due, with costs and charges, to be deducted from the proceeds, and the surplus, if any, paid to the mortgagor.

The complaint also stated, that the mortgage was duly recorded in the clerk's office of Yates county, on the day of its date; that Youngs had paid debts of Eastman, on which he was liable as surety or indorser, at the time when the mortgage was executed, which amounted to \$724.61 (of which a particular account was given); and that the estate of Hunt remained liable on a note given by Eastman to one Owens, on the 24th day of December, 1846, for \$263, on which said Hunt was indorser, which, with interest, still remained unpaid; that the mortgaged premises had been conveyed to the defendant, James Miles, who, with the other defendants, claimed some interest in the premises, which interest had accrued subsequent to the lien of the mortgage. There was the usual prayer for a foreclosure, and a sale of the mortgaged premises, and payment of the plaintiffs' demands and costs out of the proceeds.

The usual judgment of foreclosure for the sale of the mortgaged premises, and the payment, out of the proceeds of the sale, of the costs and expenses, and the amounts found due to the several plaintiffs, was entered at a special term; from which judgment Lewis O. Wilson, only, appealed to the Supreme Court at general term. On the hearing of that appeal, the judgment at the special term was reversed, and the complaint dismissed, as against the appellant, with costs, on the ground that the mortgage was fraudulent and void, as against creditors of the mortgagor, for uncertainty in respect to the debt or debts it was intended to secure.

From that judgment the plaintiffs brought the present appeal. After the bringing of such appeal both the appellants died, and the personal representatives of the appellant Youngs were substituted in his place. There had been no substitution as to the executors of Abel Hunt, and it was assumed, on the argument, that as to them the appeal was at an end.

SELDEN, J. I cannot concur with the court below in the opinion that the mortgage in question was void as against creditors or purchasers. There is no pretence, and could be none, that it was not valid between the parties to it. It described the debts which it was intended to secure, with such certainty that there could be no difficulty in determining what debts were, and what were not, embraced in the description. In such cases, the maxim, that that is certain which may be made certain, applies. It is not requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry. (*Monell v. Smith*, 5 Cow., 441; *Robinson v. Williams*, 22 N. Y., 380; *Stoughton v. Pasco*, 5 Conn., 442; *Merrills v. Swift*, 18 id., 257; *United States v. Hooe*, 3 Cranch., 73; *Kramer v. The Farmers and Mechanics' Bank*, 15 Ohio, 253.)

The mortgage having been duly recorded, if not fraudulent in fact, was as effectual against subsequent creditors and purchasers as it was against the mortgagor. If it was sufficiently certain to be valid against the party who made it, it was equally certain and valid against all persons claiming under him. If valid between the parties it was a mortgage, and, as it was duly recorded, it was not within the provision of the statute which declares void, as against

subsequent purchasers, unrecorded conveyances. The only statute bearing at all upon the question is the following:

"Every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first recorded." I can discover nothing in this statute to justify the distinction between certainty against the party and certainty as against subsequent creditors or purchasers, which forms the basis of the judgment of the court below. If the instrument was certain enough to amount to a conveyed case, it was a recorded conveyance, and valid as such.

A purchaser, with notice of any outstanding equity against his vendor, takes the place of such vendor, and acquires his rights only (*Frost v. Beekman*, 1 Johns., Ch. 301; 3 Sugden on Vendors and Purchasers, 440); and notice of circumstances sufficient to put a party upon inquiry, has the same effect as actual notice of the facts which could be learned on reasonable inquiry. (3 Sugden, 468 *Dunham v. Day*, 15 Johns., 569; *Peters v. Goodrich*, 3 Conn., 150; *Williamson v. Brown*, 15 N. Y., 359.) The registry of the mortgage was equivalent to actual notice of its existence and contents, and the purchaser, with such notice, is bound by all the equities which the holder of the mortgage had against the mortgagor, whose place he takes. (*Stoughton v. Pasco*, 5 Conn., 442, 447.) The condition of the purchaser in the present case is precisely the same as it would have been at common law, if he had purchased with actual notice of the prior mortgage. In that case it cannot be doubted that he would have taken subject to the mortgage, if it was valid against the mortgagor.

The rule adopted in Connecticut, in *Hart v. Chalker* (14 Conn., 77), on which the court below placed much reliance, is, that "where a mortgage is given to secure an ascertained debt, the amount of the debt ought to be stated." I am not disposed to question the wisdom of this rule, although it would sometimes be inconvenient and do injustice, and its propriety is not free from doubt (see 5 Conn., 449). But I cannot deduce it from our statute, which merely provides that conveyances not recorded shall be void against purchasers. The mortgage of Eastman was valid between the parties; it was a conveyance, and it was recorded, and therefore was not made void by the statute.

It is only with reference to the question of an actual intention to defraud creditors, that the indefinite description of the debts intended to be secured by the mortgage could be material. What influence such indefiniteness might have in that respect, we are not called upon to determine. There is no allegation in the answer which could raise that question, and if there had been, we could not notice it in the absence of any finding by the court below upon the question of fact. (*Grant v. Morse*, 22 N. Y., 324.) I am, therefore, of the opinion that the court below erred in declaring the mortgage void, as against Wilson.

Upon the other questions presented by the case, so far as they related to the rights of George Youngs (and to that extent only are they now before the court), I entertain no doubt that they were correctly decided by the Special Term. The judgment of the General Term should, therefore, be reversed, and that of the Special Term affirmed, as to the relief granted by that judgment to George Youngs.

There are no appellants here representing the estate of Abel Hunt, and the judgment dismissing the complaint, as against the executors of that estate, will not be affected by the judgment of this court. The propriety of bringing on the argument of the appeal, without the presence of parties representing that estate, is very questionable, but, as neither of the parties before the court interposed any objection on that account, the defect in the proceedings, if it be one, has not been regarded.

Marvin, J. The judgment of the Special Term, in favor of the plaintiffs, was reversed by the General Term, upon the sole ground that the mortgage was fraudulent and void, as to subsequent creditors, on the ground of vagueness and uncertainty in respect to the debts it was intended to secure.

It is conceded that a mortgage given to secure future contingent liabilities may be valid, but the position is that in case the debt exists or the liability has been incurred at the time the mortgage is executed, it must be truly stated, so as to enable creditors, upon examining the record of the mortgage, to ascertain the amount of the debt or the nature and character of the liability assumed.

The validity of the mortgage is not questioned upon the ground that there was, in fact, no valid consideration between the parties to it. In my opinion, the court erred in reversing the judgment. There was a good and sufficient consideration for the mortgage. The consideration expressed was \$2,400 money; but this was not the true consideration. It has long and often been held in this State that the real consideration of mortgages or deeds may be shown by parol, though different from that expressed in the instrument; and this court, in *McKinster v. Babcock* (26 N. Y., 378), applied the rule to a chattel mortgage, in which the consideration expressed was money, when, in truth, the real consideration was the indorsement of the note of the mortgagor, and the mortgage was given by way of security. This court sustained the mortgage, the referee having found as a fact that it was executed in good faith, and not with intent to hinder, delay or defraud creditors. So, in this case, the parol evidence upon the trial showed what the consideration actually was, and it was sufficient, viz., liabilities assumed by the mortgagee for the mortgagor, and the amount which had been paid of such liabilities. It may be said in this case, as was said in the case just referred to, and also in *Shiras v. Craig* (7 Cranch., 34), by Chief Justice Marshall, in which the real transaction did not appear on the face of the mortgage, that such cases are liable to suspicion; that they must sustain a rigorous examination, and that it is always advisable fairly and plainly to state the truth. And in this case I will say that it would have been far better to have speci-

fied the liabilities assumed, so that the creditors of the mortgagor or others interested would be able more readily to examine into the facts, and ascertain whether they were true or fictitious. But, if the consideration is actually valid and sufficient, and it is found as a fact, upon sufficient evidence, that the instrument was not executed with intent to hinder, delay or defraud creditors, the court cannot declare the instrument void, as to creditors, upon the ground that the consideration, as expressed, is vague and uncertain. (See *Robinson v. Williams*, 22 N. Y., 380, in which many of the cases are referred to.)

The judgment of the General Term should be reversed, and that of the Special Term affirmed.

Denio, Ch. J., Davies, Wright, Selden, Emott and Balcom, J. J., concurring. *Judgment accordingly.*

ACKERMAN v. HUNSICKER, 85 N. Y., 47, (1881). Action to foreclose a mortgage. Certain of the defendants, who were judgment creditors of the mortgagor, answered, claiming that their judgments were liens superior to the mortgage, as to a portion of the amount claimed by plaintiff to be secured thereby. The mortgage was given to plaintiff to secure him for any indorsements he had made or should thereafter make for the mortgagor to the amount of \$6,000. Some of the indorsements were made subsequent to the judgments referred to. In the opinion (per Andrews, J.) it is said:

"There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security on each new transaction. It is well known that such mortgages are constantly taken by banks and bankers as security for final balances, and banking facilities are extended and daily credits given in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established. *Bank of Utica v. Finch*, 3 Barb., Ch. 294; *Truscott v. King*, 6 N. Y., 147; *Robinson v. Williams*, 22 id., 380; *Shirras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How., (U. S.) 14; *Leeds v. Cameron*, 3 Sumn., 492."

TAFT v. STODDARD.
[142 Mass., 545.—1886.]

BILL IN EQUITY, filed October 18, 1884, by the administrator of the estate of Whitman Holbrook, to redeem a certain parcel of land in Upton from a mortgage given by Ezekiel B. Stoddard to William Dickinson, and assigned to the defendant.

Hearing, in the Superior Court, before Aldrich, J., who, after a final decree for the plaintiff, reported the case for the determination of this court, in substance as follows:

On February 28, 1870, Ezekiel B. Stoddard conveyed in mortgage, by a deed duly recorded, certain land in Upton to William Dickinson, the condition of the mortgage being as follows: "Provided, nevertheless, that if the said Ezekiel B. Stoddard, his heirs, executors, administrators, or assigns, the sum of ten thousand dollars on demand, with interest semi-annually at the rate of nine per cent., and secure and save him harmless for all indorsements, liabilities, expenses, and services, on my account or for my benefit and request, together with such sums, if any, as said Dickinson, his executors, administrators, or assigns, or either of them, shall pay for the insurance of said buildings, with lawful interest for the same semi-annually, then this deed, as also a certain note bearing even date with these presents, given by said Ezekiel B. Stoddard, to the said William Dickinson, to pay the same sum, with interest, at the time aforesaid, shall be void."

The note secured by this mortgage was for \$10,000, payable on demand, with interest semi-annually at the rate of nine per cent. per annum, and was witnessed.

On March 6, 1878, Ezekiel B. Stoddard conveyed in mortgage, by a deed duly recorded to Whitman Holbrook, a portion of the premises described in the deed to Dickinson. The deed contained a covenant that the premises were free from all incumbrances except the mortgage to William Dickinson.

On July 16, 1880, William Dickinson, in consideration of one dollar, assigned his mortgage, "the real estate thereby conveyed, and the note and claim secured thereby," to the defendant by an assignment absolute in form.

Ezekiel B. Stoddard, a relative of the defendant, having been of supposed liability, as a condition of his assigning said mortgage to the plaintiff.

The final decree, dated July 24, 1886, stated that the defendant was entitled to hold the first mortgage as security for the payment to him for his services as trustee and attorney, and for his advances for and in behalf of Ezekiel B. Stoddard, amounting in all, computed as before stated, to the sum of \$3,568.37; and that, on payment by the plaintiff, within ninety days, of this sum, with interest from the date of the decree, the defendant should assign said first mortgage and note to the plaintiff.

MORTON, C. J.: This is a bill in equity, brought by the administrator of the estate of a second mortgage to redeem land from a first mortgage. The first mortgage was originally given by Ezekiel B. Stoddard to one Dickinson, and was afterwards assigned to the defendant. It was, in form, a mortgage to secure the payment of a note for \$10,000. It was proved by oral testimony, at the hearing, that it was, in fact, given for the benefit of the defendant, to secure him for advances which he had made, and which he might hereafter make, for the benefit of the mortgagor in the settlement of his affairs, and for the services rendered by the defendant in such

settlement. Dickinson held the mortgage, until he assigned it, in trust for the defendant. *Breen v. Seward*, 11 Gray, 118. We cannot see that the rights and equities of the parties in this suit are different from what they would have been if the mortgage had been originally made directly to the defendant.

It has been repeatedly held by this court, that, on a bill to redeem by a mortgagor, it is competent for the mortgagee to show by oral testimony what was the real debt or obligation which the mortgage was given to secure, and even to show that, after it was given, the parties agreed that it should be held as security for a new and different debt. In such cases, a court of equity will not aid a mortgagor, or permit him to redeem, until he does equity, and pays the debt intended to be secured by the mortgage, according to the agreement and real equities between the parties. *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Allen, 74; *Upton v. South Reading Bank*, 120 Mass., 153. The same principle is applied when a bill to redeem is brought by one who has taken a conveyance from the mortgagor with a knowledge of the facts. *Joslyn v. Wyman*, *ubi supra*; *Stone v. Lane*, *ubi supra*.

In the case at bar, the plaintiff has no higher equity than that of the mortgagor. The second mortgage is expressly made subject to the first, and, when Whitman Holbrook, the plaintiff's intestate, took his mortgage, he was informed of the origin, character and purposes of the first mortgage. He took it with a knowledge of the facts. His administrator stands in no better position than the mortgagor; and, in this suit, the defendant is entitled to hold his mortgage as security for the payment of his services and advances, as found by the presiding justice of the Superior Court.

As the defendant never made any demands for the sums claimed for his services, we see no error in the ruling of the Superior Court, that he is not entitled to interest thereon.

The Superior Court has found that the defendant has fully executed the trust assumed by him under the indenture of 1867, and that he is not now under any liability to any of the creditors of E. B. Stoddard & Company under said indenture. It follows that the defendant cannot hold his mortgage as security for an alleged liability which does not exist. The rulings of the Superior Court were correct.

Decree affirmed.

VOGAN v. CAMINETTI.
[65 Cal., 438.—1884.]

Appeal from a judgment of the Superior Court of the County of Amador, and from an order refusing a new trial.

This was a suit for the foreclosure of a mortgage to secure the payment of a promissory note of four hundred dollars. The defendant, administrator of the estate of Shipman, the mortgagor, admitted the execution of the note and mortgage, but averred that the mortgage was given to secure advances that had been or should

thereafter be made by the mortgagee, to provide Shipman with food, care and attention during a sickness from which he was then suffering, and to pay his funeral expenses in the event of his death. It was also averred that the amount expended by the mortgagee for the purposes mentioned, was less than the face of the mortgage. The court gave judgment for the sum of two hundred and thirty-five dollars and sixty-nine cents.

THE COURT: The object of the transaction between the deceased Vogan and the deceased Shipman being to indemnify Vogan for the liabilities he had incurred and might incur on Shipman's account, the amount of the mortgage and note served only to limit the extent of the security. Upon the foreclosure of that mortgage, the amount for which judgment was rendered was, properly, the amount the mortgagee had paid under the liability for which he was secured, with interest from the day of payment. (Jones on Mort., Vol. 1, Sec. 384).

Judgment and order affirmed.

CHAPTER III.

CONVEYANCE.

(a) *Mortgage, Pledge and Lien.*

RATCLIFF v. DAVIES.

[*Cro. Jac.*, 244.—1610.]

Action of Trover and Conversion of an hatband set with pearls and diamonds; upon not guilty pleaded, a special verdict was found, that the plaintiff was possessed thereof, and pawned it to John Whitlock for £25, but no certain time appointed for the redemption thereof; that Whitlock being sick, his wife in presence, and with his assent, delivered it to the defendant, and afterwards he made his said wife his executrix, and died, who proved the will; that the plaintiff tendered to the said executrix the said £25, who refused, and afterwards demanded the hatband of the defendant, who refused to deliver it; but converted it to his own use: whereupon, &c. And in this case three points were moved: first, there being no time appointed for the redemption; whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties and all the justices *resolved*, it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. Yelverton and Croke doubted, and held, that it could not; for he at his peril ought to redeem it in his time, as it is upon a mortgage; but Fleming and the others against it: for pledging doth not make an absolute property, but it is a delivery only until he pays, &c., so it is a debt unto the one, and a retainer of the thing unto the other: for which there may be a redemand at any time upon the payment of the money. For the pledge delivered is but as security for his money lent, so as he who borrows the money is to have again his pledge when he repays it, and his tender gives him interest therein; and there is difference between mortgage of land and pledging of goods; for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods, to detain them for his security. 5 *Hen.* 7. 1. 9 *Ed.* 4. 25. 36 *Ed.* 3 *Bar.* 188. Secondly, it was *resolved*, that 7. 1. 9 *Ed.* 4. 25. 36 *Ed.* 3 *Bar.* 188. Secondly, it was resolved, by this delivery of the said goods by the *feme*, with the assent of her *baron*, to the defendant, there passed no interest of them to the defendant, but (as it were) a custody only: and therefore the

tender of the redemption ought to be made to the executrix, and not to the defendant. Thirdly, that when he tendered the money to the executrix, and she refused, it was as good as payment; and the especial property of the goods is revested in the plaintiff: then, when he demanded them of the defendant and he refused to deliver them, but converted them to his own use, a Trover and Conversion well lies, although he came unto them by a lawful delivery, and not by Trover: wherefore it was adjudged for the plaintiff.

FRANKLIN v. NEATE.
[13*M. and W.* 481.—1844.]

The judgment of the court was delivered on the 10th of December by

Rolfe, B.—This was an action of trover for a chronometer. It appeared on the trial that the chronometer in question had been pawned by the owner with the defendant, and at the time of the pawn, the owner delivered to the defendant a written paper, authorizing him to sell if the chronometer was not redeemed within a year. The owner afterwards sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought this action. On this state of facts, the verdict on the issue on the plea denying the plaintiff's possession, was by the direction of my brother Parke, who tried the cause taken for the defendant, with liberty, nevertheless, for the plaintiff to move to enter a verdict for him, with 19*£* damages, in case the Court should be of opinion that he had proved the issue. The learned Judge was inclined to think that this was not the case of a simple pawn, but that the terms on which the chronometer was pledged were such as to give the defendant something more than the right of a pawnee, and operated as a mortgage. If he was a mortgagee, and the absolute property was transferred to him, defeasible upon repayment of the money advanced, the assignee of the right of redemption, which only remained in the original owner, could have maintained no action of trover after tendering the money; but, considering the terms of the instrument which accompanied the deposit, we all agree in thinking, that, though they gave more than the ordinary right of a pawnee, viz., the right to sell, which, being part of the security for the advance, was irrevocable by the pledgor or his assignee, they did not constitute a mortgage or transfer of the entire legal property in the chattel itself. The case, therefore, stands on the same footing, as far as relates to the right of the pawnor, with an ordinary pledge.

A rule *nisi* having been granted, pursuant to the leave reserved, Mr. Petersdorff, for the defendant, showed cause, and contended that the verdict was right, on the ground that a pawnor cannot transfer to another such a right of possession as enables him to bring an action of trover. There is very little to be found in the

books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favor of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if what this pawnor transferred, or sought to transfer, was a mere right of action. But this is not so; he transfers the property in the chattel, qualified, indeed, by the right existing in the pawnee, but still a right of property, and the right of action afterwards exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser.

We do not feel at all pressed by the argument *ab inconvenienti*, urged by Mr. Petersdorff. "If several chattels," he asked, "should be pawned for one sum, could separate sales be made of each to different purchasers?" We answer, undoubtedly they may; the pawnee will, of course, not be bound to part with any of the chattels until his whole debt is paid; but, subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made. Again, it is said, suppose the chattel is injured by default of the pawnee, while in his custody, who was to sue the pawnee, the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff, if the action be for a breach of contract express or implied, unless a new one be made with the purchaser; the owner for the time being is the proper plaintiff, if the injury be by the destruction or conversion of the chattel: just as, in the case of a carrier, the original employer is the person to sue for the loss for negligent carriage, or other breach of contract—the other subsequent purchaser for the conversion after the purchase.

That in ordinary cases of bailment, not by way of pawn, the bailor may sell, is a proposition admitting of no doubt; indeed, it is assumed to be law by Lord Holt, in one of the cases relied on by Mr. Petersdorff, *Rich. v. Aldred*, 6 Mod., 216, where he says: "If A. bail goods to C., and after gives his whole right in them to B., B. cannot maintain detinue for them against C. because the special property that C. acquires by the bailment was not thereby transferred to B.;" and there does not seem to be any solid ground of distinction, in this respect, between a bailment by way of pawn and any other bailment.

With so little then of direct authority, we must act on the general principle, that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; that as an incident to such property, he has the right of sale, and that after the sale the purchaser has the same interest in the chattel which the pawnor had. The rule must, therefore, be made absolute.

BROWN v. BEMENT.

[8 Johns., 75.—1811.]

This was an action of trover, for three horses and a chair. The cause was tried at the Columbia circuit, in September, 1810, before Mr. Justice Thompson.

The plaintiff proved that he was possessed of the horses and chair, and that, afterwards, on the 26th of April, 1810, he tendered the sum of 283 dollars and 5 cents to Bement, one of the defendants, and demanded the horses and chair, who refused to deliver them, and referred the plaintiff to Strong, the other defendant. The plaintiff on the next day, made a tender of the same sum to Strong, and demanded the property, but Strong refused, saying the horses and chair were in possession of Bement.

The defendants then produced in evidence an absolute bill of sale of the horses and chair to the defendants, under the hand and seal of the plaintiff, dated 27th October, 1809, for the consideration of 210 dollars and 35 cents. And the plaintiff gave in evidence a writing bearing the same date, executed by the defendants, by which they stipulated, on the payment of 210 dollars and 35 cents to them, by the plaintiff, in 14 days from the date, to deliver to the plaintiff the horses and the chair; but if the property was lost in the meantime, they were not to be responsible; nor for any expenses attending the property during the time.

It was proved; that before the commencement of the suit, Bement had told the plaintiff he was willing to return the property which remained, but that one of the horses had been sold. The plaintiff answered, that if they could agree as to the price of the horse sold, that would create no difficulty.

A verdict was found for the plaintiff, by consent, subject to the opinion of the court; and it was agreed that if the plaintiff was entitled to recover the whole property, the verdict should be entered for 438 dollars; but if for the one horse only which had been sold, then the verdict was to be for 85 dollars; and if the court should be of opinion that the plaintiff was not entitled to recover at all, then a judgment of nonsuit was to be entered.

Three points were raised for the consideration of the court:

1. That the writing given by the defendants to the plaintiff made the property a pledge, redeemable at any time.

2. That on tender of the money, the plaintiff's right of action was complete.

3. That the plaintiff was entitled, at least, to recover the value of the horse sold.

Per Curiam. The plaintiff has not shown a right of action. Here was a complete transfer of the title of the goods in question, with a condition of defeasance, on the payment of 210 dollars and 35 cents, in 14 days. This was a mortgage, not a technical pledge; and all that was said in the case of *Cortleyou v. Lansing* (2 *Caines's Cases in Error*, 200.) respecting the nature and redeemableness of pledges, has no application to the case. The distinction between a pledge and a mortgage of goods was recognized by this court in

Barrow v. Paxton (5 Johns. Rep. 258). A mortgage of goods is a pledge and more: for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas the pawnee has but a special property in the goods to detain them for his security (2 Ves. jun. 378. 1 Powell on Mort. 3.). The title of the defendants here became absolute after the 14 days; and though it does not appear whether one of the horses was sold after or before the expiration of the time to redeem, that omission is not material, as no attempt was made, in season, to redeem.

Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

BRACE v. MARLBOROUGH.
[2 Peere Wms., 491.—1728.]

After a decree which referred it to a master to state the several incumbrances and their priority, affecting the estate of Sir William Gostwick, this case arose: A puisne judgment creditor bought in the first mortgage without notice of the second mortgage when he lent his money on the judgment, and the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage? And the Master of the Rolls, on considering the cases and precedents, *held*.

First. That if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a *plank* gained by the third mortgagee, or *tabula in naufragio*, which construction is in favour of a purchaser, every mortgagee being such *pro tanto*.

Secondly. If a judgment creditor, or creditor by statute or recognition buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for one cannot call a judgment, &c., creditor, a purchaser, nor has such creditor any right to the land; he has neither *jus in re*, nor *ad rem*, and, therefore, tho' he releases all his right to the land he may extend it afterwards. All that he has by the judgment is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *feri facias*, or may take the body, and then during the defendant's life he can have no other execution; besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterwards purchased may be extended on the judgment, nor is he deceived or defrauded, tho' the cognizor of the judgment had before made twenty mortgages of all his real

estate, whereas a mortgagee is defrauded or deceived if the mortgagor before that time mortgaged his land to another; and 'tis such a fraud as the Parliament takes notice of and punishes by foreclosing such mortgagor who mortgages his land a second time, without giving notice of the first mortgage, and in that respect this case differs from a puisne mortgagee's buying in the first mortgage.

Fourthly. If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage and statute or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured a farther sum on a security, which, tho' it passed no present interest in the land, yet must be admitted to be a lien thereon.

CONARD V. ATLANTIC INSURANCE CO., 1 Peters, 386, (1828) : Action of trespass *de bonis asportatis* brought in the Circuit Court for the District of Pennsylvania, by the Atlantic Insurance Company to recover against the defendant, John Conrad, the Marshal of that district, the value of certain teas shipped on board the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States against one Edward Thompson, as the property of the latter. The cargoes had previously been transferred by Thompson to the Insurance Co. by assignment of the bills of lading to secure the payment of a *respondentia* bond. It was held that this constituted a mortgage. The defendant contended that the statutory priority of the United States (Stat., 1799, c. 128, §65) extended to this case. The Court overruled the claim in an opinion by Mr. Justice Story, from which the following is taken :

"Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself a lien, is still superior to any lien, and even to an actual mortgage, on the personal property of the debtor.

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelluson v. Smith*, (2 Wheat., 396.) has been mainly relied on, in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court in that case is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtors's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt: or if his property has been seized under a *fiery facias*, the property is divested out of the debtor and cannot be made liable to the United States." The same doctrine may be deduced from the case of the *United States v. Fisher*, (2 Cranch., 358,) where the Court declared that "no bona fide transfer of property in the ordi-

nary course of business is overreached by the statutes," and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States v. Hooe*, (3 Cranch., 73).

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.

But it is said that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed and vested lien, as much so as a lien by mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof, and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. * * *

It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien, and doubtless it is so in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance which it bears to liens, generally recognized as such at the common law, or in equity, or in maritime jurisprudence. But, as has been truly said by Lord Coke, no simile holds in everything. *Nullem simile quatuor pedibus currit*. Lord Tenterden has said, that the word lien, in its proper sense, in the law of England, imports that the party is in possession of the thing that he claims to detain, and that where there is no possession, actual or constructive, there can be no lien. And this is generally true, perhaps universally true at the common law, independently of statutory provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow v. Mason*, before the House of Lords, (6 East., R. 21, note, 9d., 25), where he says: "Liens exist at law only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone."

"In equity, also, liens exist independent of possession, either actual or constructive; as, for example, the lien of a vendor on the land for the unpaid purchase-money. But it has been the long established doctrine, in equity, that a lien is not, in strictness, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself,

nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. It is, therefore, at most, a simple right to possess and retain property until some charge attaching to it is paid or discharged; or a mere right to maintain a suit in rem to enforce payment of the charge. Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: "Liens are not founded on property, but they necessarily suppose the property to be in some other person, and not in him who sets up the right. They are qualified rights."

Now, an attachment does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in *custodia legis*, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed and vested. Not in that of equity jurisprudence, for there a lien is not a *jus in re* or a *jus ad rem*. It is but a charge upon the thing, and then only when it has, in like manner, become absolute, fixed and vested."

Per Story, J., in *Ex parte Foster*, 2 Story, 131, (1842).

(b). *What may be conveyed—Equitable liens.*

PERKINS. CONVEYANCING (about 1550).

§65. Now is to shew of things to be granted or charged: And as to that know, that it is a common learning in the law, that a man cannot grant or charge that which he hath not: And therefore, if a man grant a rent charge out of the manor of Dale, and in truth he hath not anything in the manor of Dale, and after he purchase the manor of Dale, yet he shall hold it discharged.

§86. And, therefore, if the disseisee of one acre of land grant his right unto a stranger, it is nothing worth; but if he release all his right unto the disseisor, it is good, if it be by deed. And if he confirm the estate of the disseisor, the confirmation is good.

§90. A parson of a church may grant his title for years, and yet they are not in him for a time. But if lord and tenant be, the lord cannot grant the wardship of the heir of the tenant living the tenant. But if a man grant unto me all the wool of his sheep for seven years, the grant is good.

GRANTHAM v. HAWLEY.

[*Hobart*, 132.—1615.]

Robert Grantham brought an action of debt upon an obligation of £40 against Edward Hawley, the condition whereof was, that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it 20 pounds. Now the case upon the pleading and demurrer fell out thus: That one

Sutton was seised of the land, and 30 Eliz., in April made a lease of it to Richard Sankee for 21 years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take and carry away to his own use such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff, and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by Hutton for the plaintiff, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not. Also, the lessor never had property in the corn: and, therefore, could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues with the land to the lessor, and it was said to be adjudged. And it was agreed by the Court that if A. seised of land sow it with corn, and then convey it away to B. for life, remainder to C. for life, and then B. die before the corn reapt: now C. shall have it and not the executors of B., though his estate was uncertain. Note, the reason of industry and charge in B. fails, yet judgment in this case was given against the plaintiff, that is, that the property and very right of the corn, when it hapned, was past away, for it **was** both a covenant and a grant. And, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now, though corn be *fructus industrialis*, so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land; and, therefore, the executor shall have it, and not the heirs; yet in this case, all the colour, that the plaintiff hath to it, is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, not certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 H. 6. A parson may grant all the tithewool that he shall have in such a year: yet, perhaps, he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; forthere he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property, for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not *ex vi termini*, gives the trees.

MOODY v. WRIGHT.
[13 Metcalf 17.—1847.]

The positions taken by the opposing counsel have been fully and ably presented, in their respective arguments, but, in the view we have taken of the case, it has become unnecessary to express any opinion upon several of the points raised. We have directed

our attention more particularly to one, which is a leading and material one, and decisive of the case.

The instrument offered in evidence by the petitioner, as the foundation of the claim, purports to convey to him certain articles of personal property, consisting of hides, skins and bark, all then in existence, and in possession of the grantors, and also whatever hides, skins, bark or stock, of whatever description, that may hereafter belong to the grantors, wherever situated, and whether manufactured or not, and at market or not, or the proceeds if sold; also, all leather thereafter manufactured from the proceeds of property then on hand, and in whatever shape the property might thereafter exist, or whatever form it might assume; so that the then present and future property and earnings of the tan works might stand conveyed, pledged and hypothecated to the petitioner.

This instrument, so far as it purports to mortgage the property of the mortgagors then in existence, and held by them, was in all respects a valid instrument; and if any such property now remains for it to operate upon, it will be effectual to pass the same to the petitioner. We understand, however, that the case shows no such property in the hands of the assignee, and that the specific property conveyed by the petitioner to Wright & Hoxse, and by them reconveyed in mortgage to him, has no longer any existence, and that the only ground of sustaining this petition is that of a lien upon subsequently acquired property, which had no existence at the time of the execution of the mortgage, and which has no other connexion with it, than that, to some extent, it may have been purchased with funds which were the proceeds of various sales from the tannery; first, of the articles purchased, and their proceeds applied to the purchase of new stock, which, when manufactured, was again sold, and its proceeds invested; and so from time to time. This instrument is clearly, therefore, an attempt to mortgage or hypothecate after acquired property. Can such security be made effectual by the making and recording of such instrument, without any further act of the parties, with no delivery by the mortgagor, and no act on the part of the mortgagee, taking possession or exercising any rights of property in the newly acquired articles, by virtue of the provisions in the mortgage as to property?

This subject has been recently before us, in the case of *Jones v. Richardson*, 10 Met., 481, involving the question as to the validity of such a mortgage in a court of law. The subject was very maturely considered, and the Court were all clearly of opinion that such mortgage did not pass after acquired property. It was stated, in that case, as an elementary principle, that "a person cannot grant or mortgage property of which he is not possessed, and to which he has no title." All the qualification introduced was, that one may grant personal property of which he is potentially, though not actually, possessed, as in the case of the grant of all the wool that shall grow on the sheep he owns at the time of the grant, but not wool which shall grow on sheep which are not his, but which he may afterwards buy.

In our opinion these principles as to conveyance of property are equally sound and equally to be enforced, whether the question as to the right of property is raised in a court of law or of equity. The parties appear before us, each claiming the property by conveyance; the petitioner by the instrument already recited, and the defendant as assignee, holding by virtue of a deed from a master in chancery, for the benefit of all the creditors of Wright & Hoxse. Whether it would really be more equitable, in a case like the present, that the after acquired property should be holden by the one party or the other; whether the claims of the individual creditor would, in an equitable view, be more meritorious than those of the entire body of creditors, seeking a distribution pro rata, would depend, not so much on anything disclosed on the face of the mortgage, as upon a full knowledge of the entire course of business of the mortgagor, and the circumstances appertaining to the property which is now the subject of controversy, the mode of its acquisition, &c.

Supposing ourselves clothed with full equity powers, and treating this case as before us unembarrassed by any question as to our limited jurisdiction in chancery, we are not satisfied that the petitioner has shown any such title to this property as would authorize us to hold it to be subject to a lien for the note of Wright & Hoxse to the petitioner, as against creditors who have acquired a right to it before any act of the petitioner had taken place, reducing the property to his possession, or by asserting effectually any right under the prospective hypothecation, as by making a claim and taking possession under it, while in the possession of Wright & Hoxse. There are doubtless equitable liens which may be enforced in courts of equity, though not available in a court of law. Many such might be enumerated. That which nearest approaches the present case is that of an agreement to convey property, or do some act, the performance of which has been casually postponed: and in dealing with the rights of the parties in such case, a court of equity will consider a thing done which was agreed to be done. That class of cases does not present, however, the difficulties that arise in the present case. The property which is the subject of the agreement, in the case supposed, was in existence, and the power to convey the same, or stipulated for a conveyance, existed. Nor do the cases of *Davis v. Newton*, 6 Met., 537, and *Eastman v. Foster*, 8 Met., 19, at all conflict with the view we have taken of the present case. The property, in reference to which these cases presented questions, was in existence, was susceptible of being conveyed and was the subject of bargain and sale. In the case *Eastman v. Foster*, more particularly relied upon, the mortgage was a good and valid mortgage in law, and of property then in existence, and the party only went into equity to enforce a claim arising under such valid mortgage. The case was one of implied trust, of which this court has jurisdiction, and which it may well enforce.

The difficulty that trespasses in the present case is the want of any binding original contract, which *per se* could have force and effect to change the after acquired property, without some further

act by the parties, after the property should have come into existence. Such act we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story in the case of *Mitchell v. Winslow*, 2 Story, R. 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity. In relation to that case, it is supposed by the counsel for the petitioner, that it had, to some extent, the sanction of this court, in the remarks of the judge who delivered the opinion in the case of *Jones v. Richardson*. But we apprehend that no such view was intended to be suggested. The case then before the court was an action at law; and the obvious and quite sufficient answer to the case of *Mitchell v. Winslow* which was relied upon by the then plaintiffs, was, "that was a case in equity," without entering upon the further inquiry whether we should, as a court of equity, in a case before us, come to the same result. The case of *Langton v. Horton*, 1 Hare, 549, much relied upon as sanctioning the doctrine that such conveyance might be supported in a court of equity, seems to us to go no further than this, viz., that there having been such a contract between the parties, as would in equity have given the plaintiff a title to the cargo when it arrived, and that contract having been perfected by possession lawfully taken, it being a case of property mortgaged while at sea, and it being sufficient to take possession forthwith on its arrival, the plaintiffs were entitled to hold under this contract, as against a judgment creditor. On the other hand, another adjudication may be referred to as strongly sustaining the view we take of the invalidity of this mortgage in equity. I allude to the case of *Mogg v. Baker*, 3 Mees. Welsb., 195, in the Court of Exchequer. As I understand that case, the doctrine that a lien may be enforced in equity, in a case like the present, is wholly repudiated. The court held that an agreement to mortgage certain specific furniture then in existence would constitute an equitable title in the party holding such agreement, and prevent its passing to the assignees of the insolvent; but if it was only an agreement to mortgage the furniture to be subsequently acquired, then it would confer no right in equity. It is true, as was remarked by the counsel for the petitioner, that the court were dealing there with the equity principle of construing that to have been done which was agreed to be done; but no question arose as to the correctness of that principle of equity, and the only point of controversy was, whether, taking that to have been done which was agreed to be done, it would constitute a valid, equitable lien. And whether it would do so or not, was made to depend upon the fact whether the property was subsequently acquired; and, if so, it was held that the agreement would confer no right in equity. The doctrine of that case, which seems fully to sanction the principle we have adopted in the present case, was affirmed by the Court of Queen's Bench, in *Gale v. Burnell*, 7 Adolph & Ellis, N. R., 850.

The result to which we have come, upon the present petition, may be stated in the following propositions: The petitioner cannot hold the property in controversy, as mortgaged property, because it was not in existence, and, therefore, not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge, because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement, of such being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such a case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

As to the point suggested, that this agreement between these parties might be treated as a conditional sale by the petitioner, the change of property to take effect only on payment of the note, it was competent for the petitioner to have made such a conditional sale, and the effect of such sale would have been, that he would not have been divested of the property in the articles thus conditionally sold. But no such principle can avail the petitioner here, as no articles remain in existence that were his property and possessed by him at the time of the sale. The petitioner seeks not to reclaim such articles, but those subsequently acquired by his

debtors. Nor is there any ground for the suggestion that this may be treated as the constitution of an agency on the part of Wright & Hoxse, and that, as such agents, all their acquisitions would enure to the petitioner as the principal until the note of Wright & Hoxse was fully paid.

In no way, that we perceive, can we give effect to this contract, so as to give the petitioner the lien, upon the after acquired property, that he seeks to establish.

Petition dismissed with costs.

SMITHURST v. EDMUNDS.

[14 N. J. Eq., 408.—1862.]

This was a motion to dissolve an injunction, under circumstances which are fully stated in the opinion of the Chancellor.

The CHANCELLOR: The complainant, being the owner of the Columbia House Hotel, at Cape Island, with its appurtenances, and of the furniture therein, and being in possession of the premises, by an indenture bearing date on the seventeenth of June, 1860, leased the real estate to James H. Laird, for the term of three years from the first of May, 1860, at the yearly rental of \$5,000, payable in equal installments, on the fifteenth day of July and thirty-first day of August in each year, and sold and transferred to the lessee, the furniture and other household articles for the sum of \$5,563.42. Laird, as the lessee, as a collateral security for the punctual payment of the rent, resold and retransferred to the lessor all of said furniture and other household articles, and also sold, assigned and transferred and covenanted and agreed to sell, assign and transfer, all other articles of furniture which the lessee should purchase and place, or cause to be purchased and placed upon said demised premises during the said term, it being then known to and contemplated by said parties that it would be necessary for the lessee to purchase and place a large amount of furniture on said premises, in addition to that which was then there, and it being the agreement and intention of said parties that when and so often as any additional furniture should be purchased and placed on the premises by the lessee, it should be deemed and considered as belonging to the complainant as collateral security for the payment of said rent. And the lessee, among other things, covenanted and agreed with the lessor that the said furniture and other household articles, as well as that which then was on said premises as that which should thereafter be placed thereon by the lessee, should not be sold or otherwise disposed of, or removed from said premises during the term, but should remain thereon, as the property of the complainant, as collateral security for the payment of said rent.

The bill charges that, in pursuance of the lease, the lessee entered upon the possession and enjoyment of the premises, and that large arrears of rent are due to the complainant; that after the execution of the lease, the lessee, as had been contemplated, purchased and placed on the demised premises a large amount of furni-

ture, of the value of about \$5,000, in addition to that purchased of the complainant, which still remains thereon. The complainant insists that, by virtue of his contract with the lessee, all the said furniture belongs to him as collateral security for the payment of rent, and that it cannot lawfully be sold or removed from the said premises by the said lessee, or by virtue of any process or proceedings against him.

The bill further charges that sundry judgments at law have been recovered against the lessee, and that, by virtue of executions issued thereon, the sheriff of the County of Cape May has levied upon the said furniture on the demised premises, and advertised the same for sale. The bill prays that an injunction may be issued to restrain the sheriff from selling the said furniture, or any part thereof, and from removing the same from the demised premises. An injunction issued pursuant to the prayer of the bill. The defendant now moves to dissolve the injunction for want of equity in the bill.

The question at issue turns upon the validity and effect of the contract between the complainant and Laird relative to the furniture and other household articles specified in the agreement. As to so much of the furniture as was sold by the complainant to Laird, and which was upon the premises at the date of the lease, the validity of the contract is not called in question. But in regard to that part of the furniture which was not at the time owned by the lessee, but which it was then contemplated should thereafter be purchased and placed upon the premises, it is insisted that the contract is invalid and inoperative. (2 Story's Eq. Jur., Sec. 875; 1 Eden on Inj., Waterman, 15 note.)

To authorize the interference of the court, the complainant must show by his bill the existence of a right, legal or equitable, and the danger of the deprivation of that right. No fraud is imputed to the parties in the making of the agreement.

The objection is, that a valid sale or transfer cannot be made of chattels which at the time of the contract are not owned by the vendor, and have no actual or potential existence. It is clear that, if valid at all, the contract must be valid as a chattel mortgage. It is not a pledge. These chattels were not delivered, and they were not capable of delivery at the time of the contract. They had no existence. At the common law, there cannot be a technical pledge of property not then in existence or to be acquired by the pledgor in futuro. Story on Bailments, Sec. 286, 294.

It is equally clear that the contract cannot operate as a legal sale or mortgage of the chattels. To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold. *Grantham v. Hawley*, Hobart's R., 132; Co. Litt., 265, a, note 1; *Robinson v. Macdonnell*, 5 Maule & S., 228; 2 Kent's Com., 468; 1 Parsons on Com., 437; Story on Sales, Sec. 185, 186.

It is not necessary that the vendor should have the actual property, or that the chattels should have an actual existence. It is enough that he have it potentially. The distinction was taken in

the early case of *Grantham v. Hawley*, already referred to. The lessor in that case covenanted that the lessee of a term might take the corn that should be growing at the end of the term. It was held that the words were good to transfer the property as soon as it was extant, the lessor of the land having the crops not actually, but potentially. So it was said, a parson may grant all the tithes of wool that he may have in a certain year. But a man cannot grant all the wool that shall grow upon his sheep that he shall hereafter buy, for there he hath it neither actually nor potentially. The distinction will be found recognized in most of the leading cases, and fully stated by the elementary writers already cited.

In this case the lessee had neither actual nor potential property in the chattels mortgaged. They were articles which it was contemplated should be thereafter purchased by the lessee, and the agreement is, that when and so often as any additional furniture shall be purchased and placed on the premises by the lessee, it shall belong to the lessor as collateral security for the payment of rent, and shall not be sold or otherwise disposed of or removed from the premises during the term. It will be assumed, as the authorities clearly establish, that the agreement does not constitute a valid transfer or mortgage at law of the after acquired chattels. The real question is, whether the contract creates an equitable mortgage of the chattels which a court of equity will enforce and protect as against a subsequent execution creditor.

In the case of *Langdon v. Horton*, 1 Hare, 549, this question was carefully examined and decided by Vice Chancellor Wigram. The owner of a whaling ship, then on her voyage to the South Seas, in order to secure to the assignees certain indebtedness for advances, assigned the ship, with her appurtenances, and also all oil and head matter and other cargo which might be caught and brought home in the said ship on and from her then present voyage. It was held that the assignment was, as against the assignor, a valid assignment in equity, as well of the future cargo to be taken during the particular voyage as of the cargo, if any, which existed at the time of the assignment; and the master, having delivered up possession of the ship and cargo to the mortgagees immediately upon his return from the voyage, it was further held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterward sued out a writ of *fiери facias*, and proceeded to take the ship and cargo in execution. It may be suggested that the owner of the ship might be deemed to have a potential ownership in the whales to be thereafter caught during that particular voyage, and that upon this ground the assignment might be held valid at law. It was held otherwise, and a similar assignment was declared to be invalid at law by Lord Ellenborough, in *Robinson v. Macdonell*, 5 Maule & Sel., 228. But if by any latitude of interpretation that view might be taken it manifestly did not influence the result of the cause.

In the course of his opinion, the Vice Chancellor says: "I lay out of the view all questions as to the operation of the instrument at law, and look at the case only as a question in equity." And again he says: "I rely in this case on the general principle, that there having been such a contract as would in equity entitle the plaintiffs, as against the owner, to the cargo when it arrived, and the title under that contract having been perfected by a possession lawfully taken under the deed, which there is no attempt on the part of the owner to impeach, the subsequent judgment creditor cannot take that property from the plaintiffs." It may be again suggested that there is this further dissimilarity between the cases. In the reported case, the ship and cargo, on her return from the voyage, was delivered to the mortgagees, and thus the equitable title of the mortgagees was perfected; whereas in the present case the chattels were not delivered to the mortgagee, but remained in the possession of the mortgagor. It is true the chattels were not in the actual possession of the lessor, but they were delivered to the lessee upon the demised premises, where, in accordance with the contemplation of the parties and the terms of the agreement, they were to be used by the tenant, and from which they were not to be removed during the continuance of the term. This in no wise affected the validity of the contract, but was a delivery according to the terms and spirit of the contract, which perfected the equitable title of the mortgagee. In this regard there is no real dissimilarity between the cases.

In the more recent case of *Mitchell v. Winslow*, 2 Story's R., 630, this question underwent a more elaborate examination, by Mr. Justice Story, in the Circuit Court of the United States. The Court held that to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But the courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only.

In the course of a very elaborate opinion, after quoting at some length from the opinion of the Vice Chancellor in *Langton v. Horton*, Judge Story said: "Now it seems to me that this reasoning is exceedingly cogent and striking, and it stands upon grounds entirely satisfactory and compulsive upon the whole subject." And as the result of his investigation, he adds: "It seems to me the clear result of all the authorities, that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy." These cases, I think, in principle clearly control the present case, and I am quite satisfied to rest my conclusion upon their authority. It would be difficult,

indeed, upon a question of equity, to cite higher authority, upon either side of the Atlantic, than the eminent judges whose opinions have been referred to.

A further question occurs, viz., whether, admitting the equitable mortgage to be valid against the mortgagor, and all persons claiming under him with notice, it will be enforced against a subsequent judgment creditor of the mortgagor. It was so held by Vice Chancellor Wigram in the case of *Langton v. Horton*, already cited. The subject afterwards underwent a more elaborate examination by the same learned judge, in the case of *Whitworth v. Gaugain*, 3 Hare, 416, where the grounds of his conclusion are clearly and convincingly stated.

The motion to dissolve the injunction is denied with costs.

LOOKER v. PECKWELL.
[38 N. J. L., 253-1876.]

In replevin. On error to the Essex Circuit.

The opinion of the court was delivered by

Van Syckel, J. This cause was tried in the Essex County Circuit Court, by consent of parties, before the court without a jury, upon admitted facts. A brief statement will present the point in issue. One John M. Mackenzie, to secure his debt to the plaintiff, executed to him a mortgage upon his fixtures, stock and materials, &c., of his bakery in Newark, described therein as follows: "All the bake-house fixtures and utensils now being in and about my bakery, No. 413 Broad street; also, all flour, &c., and all other stock manufactured, and unmanufactured, and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same or any part thereof, together with," &c.

The mortgage was duly registered, as required by law. After the delivery of the mortgage, Mackenzie, in order to replenish his stock, purchased twenty barrels of flour, which were delivered to him on the sidewalk in front of his bakery, where they were seized by the defendant as sheriff, by virtue of an execution in his hands, upon a judgment in favor of Totten against said Mackenzie, for goods sold to him after the making and registering of the mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties. The question submitted on the case is, whether the twenty barrels of flour were subject to the lien of the mortgage?

Perkins, title Grants, Sec. 65, says: "It is a common learning in the law, that a man cannot grant or charge that which he hath not." A grant will operate only upon goods which the grantor has actually or potentially at the time of the grant.

Chief Justice Tindall fully recognized this rule in *Lunn v. Thorton*, 1 Com. Bench, 379, which has since been received as authority both in England and this country, as applicable to sales as well as to mortgages.

The suggestion of Chief Justice Tindall, that the grant might be so framed as to give the grantee a right between themselves to seize after-acquired goods of the grantor, was acted upon in *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & B. 830, and in other cases cited below, but the doctrine held in the principal case has not been shaken; on the contrary, it is in a mass of cases declared to be settled, if not elementary law. *Gale v. Burnell*, 7 Q. R. 850; *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471; *Jones v. Richardson*, 10 Metc. 481; *Barnard v. Eaton*, 2 Cushi. 294; *Rice v. Stone*, 1 Allen 566; *Low v. Pew*, 108 Mass. 347; *Van Hoozer v. Cory*, 34 Barb. 9; and many other cases cited in Benjamin on Sales, Sec. 79, note k.

That this is the rule at law, is regarded by Chancellor Green in *Smithurst v. Edmunds*, 1 McCarter 408, as beyond controversy. He says that to constitute a valid legal sale, the vendor must have a present property, either actual or potential, in the thing sold.

The judgment of the court below in favor of the defendant was right, and should be affirmed.

BRETT v. CARTER.

[2 *Lowell* 458—1875.]

Bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day he gave back a mortgage to secure the payment of the purchase money by instalments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants afterwards asked leave to amend, and allege the first mortgage to be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

Lowell, J. The court of appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law. *Griswold v. Sheldon*, 4 Comstock, 581. This decision has a remarkable following, and its doctrine appears to have become the settled law of New York, Ohio and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa. In several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankruptcy law of England. It is so pronounced by Mr. May, in his valuable treatise on Voluntary and Fraudulent Conveyances, p. 126, and by the cases he cites, and by the learned editors, both English and American, of Smith's Leading Cases, notes to *Twyne's Case*, vol. i., p. 1, &c. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, first, such as are expressly made so by statute, as, for instance, when a bankrupt retains the order and disposition of goods, as apparent owner, with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court, *Sawyer v. Turpin*, 91 U. S. (10 Otto) 114, 121, or 2d, Where the act is necessarily a fraud on creditors, as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole of it to one antecedent creditor. These, to be sure, are examples, but very few others could be adduced, and I understand the true law both here and in England to have been, until lately, that a conveyance for valuable present consideration is never a fraud in law on the face of the deed, and, if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor.

It is very strange that after our Legislatures have met the difficulty in *Twyne's case*, by requiring registration, which gives not

only constructive, but in most cases actual, notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud.

It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose, for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant.

I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*, 20 Iowa, 399, and of Judge Campbell in *Gay v. Bidwell*, 7 Mich. 519, in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is that this brings us to an ultimate fact of observation and experience, and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given.

Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain instalments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage, but I am asked to find fraud in law when I know, and it is admitted, there was none in fact. Besides cases already cited, see *Briggs v. Parkman*, 2 Met. 258; *Jones v. Huggeford*, 3 id. 515; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Mitchell v. Winslow*, 2 Story 630; *Abbott v. Goodwin*, 20 Maine, 408.

The second point in this case is no less interesting than the first. By the mortgage, the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, as cases presently to be cited will show, that after acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land or of chattels already owned by the transferer, but not of future chattels *simpliciter*, unless there be some *novus*

actus interveniens after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old. It may be cause of regret that the law should be different in the courts of common law and equity, but this is of no importance in bankruptcy, because it has been the law for a great while that an assignee in bankruptcy takes only the beneficial interest of the bankrupt; and the courts of law have admitted equitable defences, such as equitable liens, &c., to be set up in such cases, years before they had power by statute or usage to admit equitable pleas in ordinary controversies; and it was every day's practice to find these courts passing upon equitable titles in behalf of a defendant, which they professed to know nothing about, and certainly could not deal with, if relied on by a plaintiff. Such was and is the law, and a very just law, as far as it goes.

But granting the rule in equity to be that after-acquired chattels may be mortgaged, the point that has given me most difficulty is whether such is the law of Massachusetts. I suppose that the Federal courts, in all matters of title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the State in which they sit. Or, in other words, I understand that the thirty-fourth section of the judiciary act, making the laws of the State the rule in actions at common law, is declaratory only, and that on both sides of this court I am bound to follow the law of Massachusetts in the local questions, and the general law in general questions.

Now, the only decision I can find in equity in this State upon this subject certainly decides very distinctly that even in equity a mortgage of after-acquired chattels is invalid (*Moody v. Wright*, 13 Met. 17). In that case the court refused to follow the then recent decision of Story, J., in *Mitchell v. Winslow*, 2 Story, 630, and relied largely on the dictum of a very distinguished judge, Baron Parke, who said, in *Mogg v. Baker*, 2 M. & W., 195, that there was no such lien in equity. Some years after these decisions were rendered the House of Lords unanimously followed the doctrine of Judge Story, and reversed a decision of Lord Campbell, which had been founded on the dictum already referred to, and Baron Parke concurred in the reversal (*Holyrod v. Marshall*, 10 H. of L. 191. This was not a new doctrine in courts of equity. (See *Curtis v. Auber*, 1 Jac. & W. 532; *Re Ship Warre*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 428; *Re Howe*, 1 Paige, 129.)

These cases have been repeatedly followed in England, and even more often in this country, and, so far as I am aware, with not a single decision the other way of late years. It is true that a great many of the cases arose upon mortgages given by railroad companies, and some few judges have founded a distinction upon that circumstance. But there is no difference in principle between the mortgage by such a corporation of its rolling stock not yet *in esse* and that by a trader of his future stock in trade in a particular shop. The truth merely is, that from the nature of the former, the

large sums which they deal with, and the time at which they must be negotiated, which is before the road is finished, attention was called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors or even of subsequent mortgagees; but similar injustice will be done in all such cases to the extent of the value involved. The following are some of these decisions: *Holyrod v. Marshall*, 10 H. of L., 191; *Pennock v. Coe*, 23 How. 117; *Morrill v. Noyes*, 56 Main, 458; *Pierce v. Emery*, 32 N. H. 484; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phila., &c. Co. v. Woelpper*, 64 Penn. St. (14 Smith) 366; *Phillips v. Winslow*, 18 B. Mon. 431; *Sillers v. Lester*, 48 Miss. 513; *Pierce v. Mil. R. R. Co.*, 24 Wis. 551.

Considering the decision of Judge Story in this circuit, and the reasons given, by the court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's dictum, I am not prepared to say, that if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it, and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid.

I am of the opinion that the mortgage of 1874 created a valid lien in behalf of the defendant upon the stock of goods in the shop at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate this lien. The fixtures, however, which were not mentioned in the first mortgage, cannot be held by the second, because that was given after the bankrupt had become insolvent, to the knowledge of the defendant.

Decree accordingly.

HOLROYD v. MARSHALL.
[10 H. L. C. 191, 209-1862.]

The Lord Chancellor (Lord Westbury), after stating the facts of the case, said: "My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

"The question may be easily decided by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one

of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee, subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.

But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance, void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

"But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Nothing
"Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question."

KRIBBS v. ALFORD *et al.*
[120 N. Y. 519—1890.]

Parker, J. On the 15th day of May, 1880, one Johnson, then being the owner in fee of certain lands, executed and delivered to Thomas Argue an instrument in writing (which for convenience will hereafter be termed a lease), which conferred upon the latter the exclusive right to produce oil and gas from said land for a period of twelve years. For that purpose it permitted him to go upon the land and make necessary erections; but as to any other use

Johnson reserved the possession and right of enjoyment. It gave to Argue the right to remove any and all tools, boilers, engines and machinery; also the casing to the wells and drive-pipe, if Johnson should refuse to pay a fair price therefor.

Pursuant to the terms of the lease Argue and his assignees placed upon the property engines, boilers and other machinery necessary to carry on the operations for which the lease provided, and in view of the intent of the parties as manifested by the terms of the lease and otherwise, these articles retained their character and personality after annexation. (Potter v. Cromwell, 40 N. Y. 287; Murdock v. Gifford, 18 id. 28; Hoyle v. P. & M. R. R. Co., 54 id. 314, 324; McRae v. C. N. Bank, 66 id. 489-495.)

In October, 1880, Argue assigned his interest in the lease to Albert Garrett and Adam Prentice. Thereafter Adam Prentice, to secure the payment of \$950.50, executed and delivered to the plaintiff a mortgage on his undivided interest in the lease and upon all "his interest in the oil wells now thereon and to be by him placed thereon, with all his interest in the structures, fixtures, equipments and appurtenances now on said lease or hereafter to be placed thereon."

On the 10th of January, 1881, a copy of the mortgage was filed in the Town Clerk's office, and thereafter it was duly refiled. Subsequently, and on the 24th day of August, 1882, Garrett and Prentice sold and assigned all their rights and interests under the lease to the defendants Alford and Curtis, who thereafter finished one well, put down two others, and added largely to the plant by way of engines, boilers and other machinery.

And the substantial question presented by this appeal is, whether the tubings, casings, engines, boilers, shafting and other machinery purchased and placed upon the property after the giving of the mortgage are embraced within it. True, the appellant contends that his title to the chattels is not burdened with the plaintiff's mortgage, because, as he alleges, Alford and Curtis purchased in good faith and without notice; but this claim is not well founded, for while a search, which failed to disclose the existence of a mortgage, was timely made in the Town Clerk's office, the referee has found upon sufficient evidence to support it, that the mortgage was filed as a chattel mortgage in the proper Town Clerk's office, and within thirty days of the expiration of the year thereafter it was refiled with the statement required by statute. Alford and Curtis are, therefore, chargeable with constructive notice, and the lien of the plaintiff is not affected by their failure to find the mortgage.

In some jurisdictions validity is denied to a contract in so far as it purports to embrace property to be acquired after date. The reason assigned for this holding is tersely stated in Perkins (§ 65): "It is a common learning in the law that a man cannot grant or charge that which he hath not."

In others it is held to be invalid in law and yet operative in equity. Unexplained, this seems to be a solecism, and results from a use of language which fails to accurately convey the idea intended.

Invalidity at law imports nothing more than a mortgage of prop-

erty thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating against as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this State. (*McCaffrey v. Woodin*, 65 N. Y. 459; *Wisner v. Ocumpaugh*, 71 *id.* 113; *Coats v. Donnell*, 94 *id.* 168-177.)

As between the mortgagor, or his assignee, and the mortgagee, therefore, the chattel mortgage operated to create a lien in equity as to the chattels purchased and placed upon the property by the mortgagor subsequent to its date. This lien the trial court rightly enforced by its judgment. But it went further and declared, in effect, that the lien attached to the personalty placed upon the property by the assignees of the mortgagor as well. This, we think, was error. The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not assume or agree to pay the mortgage or carry out its provisions. Indeed, the assignment contained no condition or covenant whatsoever, and the assignees did not even know of the existence of the mortgage. Their acceptance of the lease bound them to fulfill the covenants running with the land. (113 Penn St. 83; *Spencer's Case*, 1 Smith's L. C. 145.)

But it did not, in addition, burden them with the obligation to make good the personal covenants given by the lessee to third parties as security for an indebtedness, because they had constructive notice of the existence of the mortgage the lien of plaintiff can be enforced, and the defendants deprived of the machinery on the premises at the time of the purchase by them of the lease. But the lien provided for by the instrument could in any event only extend to property thereafter acquired by the mortgagor. It could not attach to chattels to which the mortgagor has not acquired either title or possession. Indeed, it does not, by the terms, purport to embrace any other after acquired property than that placed thereon by the mortgagor.

All concur except Bradley and Haight, JJ., not sitting.

Judgment accordingly.

THE ROCHESTER DISTILLING CO. v. RASEY.

[142 N. Y. 570—1894.]

Appeal from order of General Term of the Supreme Court in the Fifth Judicial Department, made Oct. 4, 1892, which reversed a judgment in favor of defendant entered upon a verdict directed by the court and granted a new trial.

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the repayment of money borrowed from him,

executed and delivered to him a chattel mortgage, which covered "the grass now growing upon the premises leased, etc.; also all the corn, potatoes, oats and beans, which are now sown or planted, or which are hereafter sown or planted during the next year, etc." At the time but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes, and all that of the beans was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops and advertised their sale in August, at which sale plaintiff purchased them. After the levy by the sheriff, Page, the chattel mortgagee, on July 15th foreclosed under his mortgage, gave notice and sold the growing crops to the defendant. Defendant took possession of the property so purchased and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans and for the defendant as to the potatoes, and ordered the exception taken to that direction to be heard, in the first instance, at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge and ordered a new trial, but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

GRAY, J. "I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy, and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion in several cases of a kindred nature, in the reports of this court and of other courts in this State, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential existence, can operate to charge them with a lien, when they come into existence, as against an attaching or an execution creditor, has frequently been discountenanced and repudiated. *Grantham v. Hawley* (Hobart, 133), is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he has raised. It is unlike some of the cases which have arisen between the lessor of land and his lessee. In such a case a different principle might operate to create and support the lien of the landlord upon the crops

as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised to secure the payment of the rent would operate and be given legal effect, as a reservation at the time of the title to the product of the land. That was the case of *Andrew v. Newcomb* (32 N. Y. 417), where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord until the tenant should give him security for the rent. Judge Denion repudiated the idea that the arrangement could be called a conditional sale of the flax, because the subject was not in existence. He held that the idea of a pledge or of a sale had no application and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops when they came into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on *Chattel Mortgages*, upon the subject of mortgaging a crop not yet planted, says (Sec. 149): "The weight of authority inclines to the view that the lien is an equitable one and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agreement;" and again, he says: "The authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching, or judgment creditors of the mortgagor."

About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in praesenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity would enforce as against the latter.

In *Gardner v. McEwen* (19 N. Y. 123), the chattel mortgage to the plaintiff upon property in the store, "or which might thereafter be purchased and put into the store," was held inoperative to convey the title to the after-acquired property, as against the defendant who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey v. Woodin* (65 N. Y. 459), was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages in default thereof." By virtue of this provision

in the lease the defendant took the farm produce. The decision upheld the right of the landlord to do so, holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen* (*supra*), it was remarked that "is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights as a defence to the plaintiff's (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey."

Kribbs v. Alford (120 N. Y. 519) recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired, but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor, which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien, when the property came into existence some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien, and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed, and under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.

All concur, except Earl, J., not voting. *Ordered accordingly.*

PLATT v. NEW YORK & SEA BEACH RAILWAY CO.
[9 App. Div. 87—1896.]

Appeal by the petitioner, August Meidling, as guardian *ad litem* of August Meidling, Jr., an infant, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the Clerk of the County of Kings on the 23d day of May, 1896, denying the petitioner's motion to vacate an order appointing a receiver and also a judgment entered in the action, or to modify the same.

This action was brought for the purpose of foreclosing a mortgage executed by the New York & Sea Beach Railway Company. On January 11, 1896, the plaintiffs in this action procured an order appointing a receiver of said company, and all the property then owned by it. Subsequently a judgment of foreclosure was entered by which the receivership was continued and a sale directed of all the property in the receiver's hands. Thereupon the appellant, who is a judgment creditor of the New York & Sea Beach Railway Company, instituted this proceeding for the purpose of having the order appointing the receiver and the judgment of foreclosure and sale so modified as to affect only such property as the mortgagor had when the mortgage was executed.

HATCH, J. "The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal property purchased subsequent to its execution, as against the petitioner herein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto. By the provisions of the statute (Laws 1850, Chap. 140, Sec. 28, Subd. 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing or operating the railroad. And this authority has been continued in the same language under the revision of the railroad law (Laws 1892, Chap. 676, Sec. 4, Subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage on its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage at-

taches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired and whether such property be such as is dominated real or personal. So it was early held that such a mortgage created in equity, a lien upon property subsequently acquired superior to the lien of a subsequent incumbrance by mortgage or judgment. (*Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 id. 447; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302). In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the Federal courts. (*Mitchell v. Winslow*, 2 Story, 630; *Central Trust Co. v. Kneeland*, 138 U. S. 419).

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and if so, was it requisite that the mortgage should be filed as a mortgage of chattels. The Supreme Court divided upon the question, and decisions were rendered both ways. The Court of Appeals, in *Hoyle v. Plattsburg & Montreal R. R. Co.* (54 N. Y. 314), settled the question by holding that it was personal property, and that the mortgage covering it must be filed as a mortgage of chattels, as prescribed by the act of 1833, or the same would be void as against the general creditors of the corporation. To meet this conclusion, the Legislature, in 1868, passed an act (Laws of 1868, Chap. 779), providing that it shall not be necessary to file such mortgage, as a mortgage of chattels when it covers real and personal property and is recorded as a mortgage of real estate in each county in or through which the railroad runs. By this act the status of such property, so far as it relates to liens by way of mortgage is made practically subject to the same rules and is placed upon the same footing as real property. The business carried on by railroads, the great extent of territory which they cover, and the fact that the rolling stock is at all times widely distributed, not only throughout the State through which its lines mainly run, but also throughout the different States of the Union, create an essential difference between it and property whose *situs* is practically fixed. This, coupled with the necessity which exists for certainty of security to those advancing money, usually in very large amounts, upon the faith of railroad property and the practical difficulty, if not impossibility, of a railroad being able to realize upon its property in this manner, if the technical rules respecting liens upon personal property should obtain, evidently created an intent in the mind of the Legislature to make such property subject to the same rules, so far as practicable, as apply to liens upon real property. It is quite evident that if it should be held necessary to constantly revise such a mortgage, in order to cover what has

been, it may be purchased by the money advanced or to supply operating needs and replenish what is destroyed, it would render such security so doubtful and precarious as not only to impair, but to practically destroy its value. We can see no reason for drawing a distinction in this regard between real and personal property. On the contrary, as the authority for the mortgage of both is derived from the same source, and the same reasons exist why both should be available and answerable as security, we think it more in harmony with the legislative intent to subject it to the same rules. (*N. Y. Security Co. v. Saratoga Gas Co.*, 88 *Hun.*, 569). This view does not bring us in conflict with *R. D. Co. v. Rasey* (142 *N. Y.* 570). That case proceeded from the well-settled legal rule that a mortgage of chattels, having no actual or potential existence when the mortgage was given, is void as to intervening creditors. For reasons already stated that rule has no application to a mortgage of this character.

It follows that the order appealed from should be affirmed.*

Morrill v. Noyes.—56 *Me.* 458—1863. Per Davis, J.

The question whether a mortgage of personal property not in existence, or not owned at the time by the mortgager, can be made available by the mortgagee, as a lien upon property afterwards acquired, has been discussed in many recent cases, with some apparent difference of opinion. Some of the courts have denied that any difference exists, and have attempted to reconcile the cases on the ground that such a mortgage, though void at law, is valid in equity. But this is a loose use of language, and tends more to confuse than to reconcile. If such a mortgage is absolutely void, for want of any subject matter to support it, then it should be so held in equity, as well as at law. But, if not thus void, to what extent and in what sense, is it valid? It is only by conceding its validity that it is pertinent to inquire whether the remedy is in equity, or by a suit at law.

As a general proposition it may be said that a mortgage of such goods as may be in a store on a future day, or of such furniture as may be in a house, or of such machinery as may be in a mill, or of such stock as may be on a farm, when no particular property is referred to, will not convey any title or create any lien upon, such property subsequently acquired, which can be upheld or enforced in a suit at law. (*Head v. Goodwin*, 37 *Maine*, 181; *Barnard v. Eaton*, 2 *Cush.*, 294; *Codman v. Freeman*, 3 *Cush.*, 306; *Otis v. Sill*, 8 *Barb.*, 102; *Gardner v. McEwen*, 19 *N. Y.*, 5 *Smith*, 123; *Tapfield v. Hillman*, 46 *Eng. C. L.*, 243; *Lunn v. Thornton*, 50 *Eng. C. L.*, 379; *Gale v. Burnell*, 53 *Eng. C. L.*, 850.) In Connecticut a mortgage of a shifting stock of goods in a store was held to create the same lien upon goods subsequently purchased as upon those owned at the time. (*Holly v. Brown*, 14 *Conn.* 255.) A similar decision was made in this State, in the case of *Head v. Goodwin*, 37 *Maine*, 181. But that case is questioned in *Jones v. Richardson*, 10 *Met.*, 481, and it was substantially overruled in *Pratt v. Chase*, 40 *Maine*,

*Affirmed in 153 *N. Y.*, 670.

269. The question is therefore no longer an open one in this court.

We can understand these cases better by referring to another class in which conveyances of property, not in existence at the time, have been upheld, either at law or in equity. And we think it will be seen that sales or mortgages of such property have been sustained when within the following rules:

1. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value?

2. The vendor or mortgagor must have a present, actual interest in it, or concerning it. As is said in illustrating Rule 14, of Bacon's Maxims: "The law doth not allow of grants, except there be the foundation of an interest in the grantor." There must be something *in presenti*, of which the thing *in futuro* is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

Thus, one may sell all the wool which shall grow for a term of years on sheep owned by him at the time; but not the wool to be grown on so many sheep, if he does not own them. *Grantham v. Hawley*, Hobart, 132; *Smith v. Atkins*, 18 Verm., 461. So he may sell the grass, or any crop that does not require annual renewal, that shall grow upon his farm for a term of years. *Jencks v. Smith*, 1 Coms., 90; *Bank of Lansingburg v. Crary*, 1 Barb., 542; *Milliman v. Neher*, 20 Barb., 37.

In the case at bar, the subject matter of the contract was sufficiently definite and certain; its subsequent existence was reasonably sure; and the mortgagers had an existing interest in, and title to, the other property then mortgaged, of which this was to be an essential part, necessary for its use, to be added to it for the purpose of finishing it. It is entirely unlike the case of a changing stock of goods.

But, if the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged, with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it, it is so appurtenant to it, that the company have a present, existing interest in it, sufficient to uphold the grant of both together—the one as incident to the other. Their title to the railroad is "the foundation of an interest" in the cars and engines to be acquired for its use.

That a mortgage of a railroad and the franchises of the company, with all the rolling stock then owned and to be afterwards acquired and placed on the road, will create a valid lien upon cars and en-

gines subsequently purchased, there would seem to be no longer any doubt. Redfield on Railways, s. 235, notes 21 and 24 Pierce's Am. Railroad Law, 531; Am. Law. Reg., July, 1863, 527.

The decisions sustaining such mortgages are not understood to be in conflict with those in which other mortgages of such property have not been upheld. The general rule, that property not *in esse* cannot be conveyed, is not abrogated. Nor will such mortgages be upheld in equity, any more than at law, unless they are within some of the exceptions to the rule. But, if a mortgage is within any of the exceptions, it will be sustained, and the parties will be entitled to appropriate remedies.

Upon the whole case, we are of the opinion that the mortgage to Myers created a valid lien upon the engines and cars, as they were purchased and placed on the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage will be entitled, if they claim it, to have the trust enforced, not only against the railroad, but against the rolling stock subsequently acquired.

*Plaintiffs nonsuit.**

CRANE v. TURNER.

[7 Hun. 357—1876]

Appeal from a judgment entered, on a decision at Special Term. The facts in the case were, that on February 18, 1865, Ethan A. Pierce purchased a farm in Truxton, New York, by parol, and immediately entered into possession thereof, paying part of the purchase-price. March 21, 1865, Pierce executed a mortgage to Aurora O. Pierce, which was recorded October 12, 1865. October 31, 1865, the farm was conveyed to Ethan A. Pierce, by a deed which was recorded February 17, 1866; which deed recited that Pierce had been in possession of the farm since February 18, 1865, under a contract for its purchase. March 12, 1868, Aurora O. Pierce assigned said mortgage to the plaintiff's testator, which assignment was recorded September 28, 1871. January 28, 1870, Ethan A. Pierce conveyed the premises to his son, J. Dennison Pierce, and took back a mortgage which was recorded February 3, 1870. J. Dennison Pierce had notice of the existence of the mortgage to Aurora O. Pierce. August 1, 1870, Ethan A. Pierce assigned the mortgage, given by J. Dennison Pierce, to Robert T. Turner, which assignment was recorded October 17, 1871. Turner searched the record back to the date of Ethan A. Pierce's deed, read it, and had actual knowledge of its contents. He inquired of Ethan A. Pierce if the mortgage executed by J. Dennison was the first lien, and was informed that it was. He made no other inquiry, and neglected to search the records back to February 18, 1865, the date, since which he was informed by Ethan A. Pierce's deed, that Pierce had been in possession under a contract of purchase. Turner paid a full consideration, upon his purchase of the mortgage executed by J. Dennison Pierce, and had no actual knowledge of the existence of the plaintiff's mortgage. The question litigated was: Which mortgage was the prior lien?

*Compare *Howe v. Freeman*, 14 Gray 563, at 577.

The following is the opinion delivered at Special Term, and referred to in opinion of Bockes, J., below:

FOLLETT, J. Any present interest, legal or equitable, in real or personal property, which can be the subject of a sale, may be the subject of a mortgage (1 Hilliard on Mortgages, chap. 1, s. 4; 4 Kent's Com., 144). At the date of the execution of the plaintiff's mortgage by Ethan A. Peirce, said Pierce was in possession of this farm under a parol contract of purchase, having paid a part of the purchase-price (which contract afterwards was decreed to be and was performed), and Pierce was therefore possessed of a defeasible estate of inheritance in the farm. This estate could have become the subject of a sale; it was devisable, or in case of the death of Pierce intestate, would have descended to his heirs; and was therefore mortgageable.

Plaintiff's mortgage was a "conveyance" within the thirty-eighth section of chapter 3, of part 2 of the Revised Statutes.. The mortgagee was a purchaser within the thirty-seventh section, and the estate mortgaged was "real estate or any portion thereof," within the first and thirty-sixth sections; and, for these reasons, the mortgage was, at the date of its record, legally recordable, though the mortgagor had not then acquired the absolute fee, and though the evidence of his title to a less estate had not been executed; and the plaintiff's mortgage was duly recorded as against the defendant Turner, claiming under the same title.

Section 1 of the recording act provides that: "Every conveyance of real estate * * * shall be recorded * * * and every conveyance not so recorded shall be void, as against any subsequent purchaser in good faith and for valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

"If," in the language of Chancellor Kent, in *Parkist v. Alexander* (1 Johns., 398), "this does not mean that a mortgage duly recorded shall be preferred to a subsequent bona fide deed without notice, it is senseless and idle, and worse than idle—it is delusive, and a snare to the unwary."

This case arose under the act of 1801 (1 Rev. Laws 1801, 480), and *Johnson v. Stagg* (2 Johns., 510), arose under the act of 1788 (2 Jones & Varick, 266), yet, as to the question here involved, there is no difference in principle between either of these acts and the Revised Statutes; and it must be held that the plaintiff's mortgage is the prior lien.

But it is not necessary to place the conclusion arrived at solely upon the foregoing grounds. While it is true, as a general rule, that a purchaser is not bound to search the records for incumbrances as against a title not appearing by the records (*Cook v. Travis*, 20 N. Y., 402; *Losey v. Simpson*, 3 Stockton, 246; *Gerard's Titles to Real Estate*, 593), still this is not an universal rule, and is not applicable when the purchaser has actual notice of the existence of a mortgageable estate, in the person against whom the search is made, prior to the date of the evidence of such person's title to the absolute fee, as in this case. Turner personally searched

the records back to and found the deed to Ethan A. Pierce, which recited that Pierce had been in possession of the farm since February 18, 1865 (a date prior to the date of plaintiff's mortgage), under a contract for its purchase; and, upon his cross-examination, Turner testified as follows:

Q. "You found a conveyance to Ethan A. Pierce, I suppose?"

A. "I did; yes, sir."

Q. "And you knew, by the recitation in that, that he had been in possession since the preceding February?"

A. "Yes, sir; I knew whatever the deed recited."

Thus, by this recital, having *actual notice* that Pierce had been possessed of this estate in the farm since February 18, 1865, and the law charging Turner with notice that this estate was mortgageable, and that, if mortgaged, the mortgage might have been legally recorded, he was bound by the record of the plaintiff's mortgage and the recital; and his own mortgage is a subsequent lien to the mortgage of the plaintiff.

But, conceding that the record of the plaintiff's mortgage, together with the recital, do not amount to a statutory or constructive notice, yet it was sufficient to have put Turner upon inquiry. He was apprised that Pierce had possessed a mortgageable estate since February 18, 1865, and he was bound to inquire diligently in the direction most likely to afford information; and it was not due diligence to stop short at the date of Ethan A. Pierce's deed in his search of the records, and then only inquire of Ethan A. Pierce, the person who was then interested in selling this second mortgage nad making it appear a first lien. If, January 1st, a grantee receives a deed and enters into possession, but neglects to record the deed, it is destroyed, and subsequently he receives a new deed bearing a later date and reciting that it is confirmatory of a deed dated January 1st under which he has been in possession since that date, and which deed has been lost, it would not be held that a search back to the date of the confirmatory deed was due diligence in a person who had actual notice of the recital even though accompanied by inquiry of the grantee; and, if he should take a mortgage and record it, it would not have precedence over a duly recorded mortgage, given between the dates of the first and second deeds.

The defendant Turner invokes the application of section 143 of chapter 1, part 2, Revised Statutes, and contends that the plaintiff's mortgage not containing covenants of title, it operated only upon the title which Ethan A. Pierce then had. While a mortgage, as well as an assignment of a mortgage, is a conveyance within the chapter relating to the recording of conveyances, no authority has been cited that a mortgage under the statutes of this State is a "grant or conveyance" within the meaning of section 143 of chapter 1, part 2. Article 4 is of alienation by deed.

At an early period at common law, before the right of an equity of redemption after condition broken had been established, the mortgagee (upon condition broken) became vested with an absolute and irredeemable title, for which ejectionment could be maintained against the mortgagor; and the doctrine of covenants for

title was applied upon the theory that the mortgage conveyed the legal title. But there is now a broad distinction between a mortgage and even a conditional deed. No legal estate vests or is intended to vest in the mortgagee. This mortgage stands merely as security for a debt, and his interest is a chattel interest; and never, by the mere operation of a mortgage, does title vest in the mortgage, and the absence of covenants for title in the plaintiff's mortgage does not affect the result; and a judgment decreeing the plaintiff's mortgage the prior lien is ordered, with costs.

M. M. Waters, for the appellant.

Wm. G. Choate, for the respondents.

BOOKES, J.:

We are entirely satisfied with the opinion of Mr. Justice Follett in this case. We concur with him that the mortgagor in the plaintiff's mortgage had a mortgageable interest in the premises at the time that mortgage was given and recorded. He well found, also, that the mortgagee in the defendant's mortgage had knowledge of the plaintiff's mortgage when he took it; and the learned judge was undoubtedly right in his conclusion that the defendant Turner must be held, under the proof, to legal notice of the existence of the plaintiff's mortgage when he accepted the assignment of his mortgage from his assignor. Therefore, neither the defendant's assignor, who was mortgagee in the security, nor the defendant himself, held the position of a *bona fide* mortgagee as against the holder of the plaintiff's mortgage. Thus the defendant Turner could not claim priority of payment over the plaintiffs from the avails of the sale of the mortgaged premises.

We are quite willing to adopt the reasonings of Mr. Justice Follett, and his conclusions both of fact and law.

The judgment should be affirmed, with costs.

Learned, P. J., and Boardman, J., concurred.

Judgments affirmed, with costs.

HOYT v. MARTENSE.

[16 N. Y. 231—1857.]

Appeal from the Supreme Court. The plaintiff brought his action to compel the defendant to account for the money received by him upon the sale of certain lots of land in Williamsburgh, and to convey to the plaintiff other lots remaining in his hands unsold, claiming that the lots, and the proceeds of such as had been sold, were held by the defendant as security for the of a debt by one Charles Hoyt. On the trial, at the Kings County Circuit, before Mr. Justice Barculo, without a jury, the following facts appeared: On the 15th of August, 1840, Charles Hoyt, being indebted to the defendant in the sum of \$3,000, with interest from May, 1839, assigned to him a bond executed by one Corbitt, on which there was due \$3,500, with interest from May 1, 1836, and also a mortgage, executed by said Corbitt as collateral to said bond, of thirty-six lots in the then village of Williamsburgh; the defendant, by a written instrument of the same date, acknowledged that he had re-

ceived such assignment from Charles Hoyt as collateral security for Hoyt's indebtedness to him, and agreed to reassign the bond and mortgage on the payment of certain notes, also assigned to him, by the plaintiff, at the same time and for the same purpose, "accounting to him for the principal and interest which may be collected thereon."

In 1842 a bill was filed in the late Court of Chancery for the foreclosure of Corbitt's mortgage, the defendant, Martense, and Charles Hoyt being complainants therein. Under the decree made in that suit, the thirty-six lots were sold in parcels, at three sales made by masters in Chancery, in 1842 and 1844, and all of the lots were bid in by Martense for sums amounting in the aggregate to \$2,785.

In 1847 Charles Hoyt assigned his interest and right of action, arising out of the transactions, to the plaintiff, who brought this action; the defendant having, as the complaint averred, in the meantime made sales of some of the lots, bid in by him, for sums exceeding by several thousand dollars the debt as security for which the Corbitt mortgage was assigned to him, and having actually received on account of such sales more than enough to cancel Charles Hoyt's indebtedness. Upon the plaintiff's closing, his proof, the court decided, under exception by the plaintiff, that the decree and sales in the suit in Chancery, and the masters' deeds in execution thereof, vested an absolute estate, in the lands described in the masters' deeds, in the defendant for his own use, discharged of all the equity of redemption and interest which Charles Hoyt had in the bond and mortgage before the foreclosure. Judgment was ordered for the defendant, which, upon appeal, was affirmed by the Supreme Court, at general term in the Second District, and the plaintiff appealed to this court.

Nicholas Hill, for the appellant.

John A. Lott, for the respondent.

BOWEN, J. This case cannot be distinguished, in principle, from *Slee v. Manhattan Company* (1 Paige, 48). In that case, as in this, the plaintiff, being the holder of a bond and mortgage, assigned them to the defendant, as security for a debt owing by the former to the latter, which mortgage was foreclosed by the assignee, and the mortgaged premises were bid in by him for a sum less than the amount secured by the mortgage, and less than the amount of the debt which the assignment was made to secure; and the assignee was required, on receiving the amount of his debt and interest, to convey the mortgaged premises to the assignor.

That case was decided in 1828, and the correctness of the decision has not, that I am aware of, been called in question until the decision of the case at bar in the Supreme Court; and, as transactions may and probably have occurred, and rights been acquired, with reference to the rule there adopted and enforced, the case should not now be overruled, unless a palpable error was committed. The doctrine *stare decisis* is a salutary one, and should not ordinarily be departed from, where the decision is of long standing and rights have been acquired under it, unless considerations of

public policy demand it. That decision was made after full consideration; and I am by no means prepared to dissent therefrom, but, on the contrary, think that the case was a proper one for the application of the equitable rule which prohibits a trustee, or person acting in a fiduciary capacity, from speculating out of the subject of the trust.

In the case cited the foreclosure was by advertisement under the statute, while in this case it was by action, the assignor and assignee being the plaintiffs; and it is claimed that these circumstances, especially the fact that the plaintiff in this action was a party plaintiff to the foreclosure suit, distinguish the two cases.

But I do not understand how or upon what principle the rights of Hoyt, the plaintiff in this action, are affected by this being made a party to the foreclosure suit. The assignment to Martense was, in effect, a mortgage of the mortgagee. The object of the action in favor of Hoyt and Martense was solely to foreclose the equity of redemption of Corbitt, the original mortgagor in the mortgaged premises, and had no reference whatever to the right of Hoyt to redeem the mortgage by the payment of his debt to Martense. Hoyt's right of redemption was wholly unaffected by the foreclosure and sale. Had the premises been purchased at the sale, under the decree in the foreclosure suit, by a third person, for an amount exceeding the debt due to Martense, the latter would have been liable to account to Hoyt for the excess, or at least for such an amount of the excess as, together with the amount of the debt to Martense, would be equal to the amount the original mortgage was given to secure. But as Martense purchased the premises at the sale, he, after the purchase, held the land, in place of the mortgage, as security for his debt. He held the mortgage, and the proceeds and avails of it, as trustee for Hoyt, after what was due him was paid, and equity will not permit him to purchase in the premises, for his own benefit, and speculate therefrom at the expense of his *cestui que* trust.

It is true that, prior to the foreclosure and prior to the assignment, Hoyt held the mortgage only as security for the mortgage debt, and payment of this debt would have extinguished his interest in the mortgaged premises when, by this action, he seeks to compel Martense to convey the whole premises, or account for the proceeds thereof, after payment to the latter of the debt due to him, and that, too, without reference to the amount secured by the mortgage to Hoyt. But Martense held the assignment of the mortgage only as security for the debt due to him from Hoyt, and his relations to Hoyt were wholly unaffected by the foreclosure and sale, while the equity of redemption of Corbitt in the mortgaged premises was barred thereby.

I think that the judgment of the General and that of the Special Term of the Supreme Court should be reversed, and a new trial be granted, with costs to abide the event.

Comstock and Brown, Js., not having heard the argument, expressed no opinion. All the other judges concurring.

Judgment reversed.

VANDIVEER v. STICKNEY.

[75 Ala. 225—1883.]

Appeal from Montgomery Circuit Court.

Tried before Hon. JAMES E. COBB. This was a statutory real action in the nature of ejectment brought by William P. Vandiveer against Henry G. Stickney and Mary E. Stickney; was commenced on 17th May, 1880; and, as to that portion of the land actually in controversy, to which a disclaimer filed by the defendants did not apply, the cause was tried on issues joined on the pleas of not guilty and the statute of limitations of ten years, the trial resulting in a verdict and judgment for the defendants.

The evidence introduced on behalf of the plaintiff tended to show that "the property sued for was the property of R. B. Owens at his death; that the said Owens died intestate, in the year 1862, leaving as his only heirs-at-law his children, William, Edwin, and Emma Owens, and Mrs. Stickney, the defendant; that said Emma died in March, 1869, unmarried, and without children;" that on 16th June, 1870, said Edwin and William Owens executed to the plaintiff a mortgage on an undivided two-thirds interest in the land described in the complaint, to secure money then loaned to them by the plaintiff; and that said debt had not been fully paid.

The evidence introduced on behalf of Mrs. Stickney tended to show that her sister Emma, at the time of her death, was about sixteen years of age; that prior to her death she expressed a desire that Mrs. Stickney should have her interest in her father's estate, on account of her care of her and on account of the money she had spent for her; that within a few days after the death of the said Emma, Edwin and William Owens and Mrs. Stickney "met and discussed the matter between them, and it was agreed between them that Mrs. Stickney should have Emma's interest in said property;" that this agreement was verbal; that from the time from said agreement, Mrs. Stickney entered into the possession of said property" by herself, or her husband, as trustee, or tenants, claiming the entire property as her own in good faith, continuously, openly, notoriously and adversely;" that she has continued "in such possession of the same by herself, husband or tenants, and was in such adverse possession at the time of the execution of said mortgage to the plaintiff, she, at that time, and ever afterwards, claiming the said property as her own, in good faith, openly, notoriously and adversely to her brothers and all the world:" that on 21st February, 1870, the said Edwin executed a deed, conveying to Mrs. Stickney his undivided interest in said property, which deed was duly recorded; that the said William "had conveyed to Mrs. Stickney his undivided one-fourth interest in his father's estate, of which he was possessed, before his sister Emma's death, and that the deed conveying said interest was duly executed, prior to the death of his sister, Emma, and upon a valuable consideration; that the only right to said William's one-twelfth interest in said real estate, acquired through his said sister, Emma, claimed by Mrs. Stickney, was under and through said verbal agreement, and the adverse possession

thereof as aforesaid;" and that after said verbal agreement, neither the said William nor the said Edwin ever asserted any right, title, claim or interest in or to the share of the said Emma in said property.

Plaintiff then introduced evidence tending to show that Edwin and William Owens were in possession of said stables and stable lot (a part of the property in controversy) in the spring of 1870, and at the time of the execution of said mortgage; and there was also evidence introduced by defendants, tending to show that the said William and Edwin Owens, while in possession as aforesaid, at the time of the execution of said mortgage, were there as the tenants, and employees of the defendants, Stickney and wife, and in no other capacity. The said plaintiff also testified that he had no knowledge of the claim or title of Mrs. Stickney to the interest of her said brother William in said Emma's one-fourth of said property described in said mortgage.

The foregoing was the substance of the evidence introduced on the trial bearing on the questions decided by the court. The plaintiff reserved numerous exceptions to charges given and refused, which the opinion does not render necessary to set out.

Those charges are here assigned as error.

SOMERVILLE, J.—We discover no error in the rulings of the Circuit Court, as shown in the present record.

In *Collins v. Johnson*, 57 Ala. 304, it was decided that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years. The fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar or the statute is complete. It is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. The essence of adverse possession is the *quo animo* or intention with which the possession is taken and held by a defendant. It is in the settled language of the books, the intention which "guides the entry, and fixes its character."—Angell on Lim., sec. 386; *Ewing v. Burnet*, II. Peters (U. S.), 41. Even where the technical relation of landlord and tenant exists, and despite the settled rule that a tenant will not be permitted to dispute the title of his landlord, there is no principle of law or of public policy which forbids a tenant from holding adversely to the landlord, so as to acquire title of the demised premises under the operation of the statute of limitations. But in all such cases, the presumption in the first instance is, that the tenant's possession is permissive and in subordination to the title of the landlord, and there must be clear and positive proof of a disclaimer and renunciation of the superior title, brought home to the knowledge of the landlord with unquestionable certainty.—Angell on Lim., sec. 444; 2 Brick. Dig., p. 200, secs. 101, 102.

The evidence tended to show that the defendants held adverse possession of the lands in suit for more than ten years prior to the commencement of the action. The undivided interest of Emma Owen, which on her death descended in part to her two brothers, William and Edwin, was released by parol to their other sister, Mrs. Stickney, who is one of the defendants. Her adverse possession commenced at this time, which was about the middle of March, 1869, and is shown to have continued, without any subsequent recognition of the title of her donors, until the commencement of this suit, in May, 1880. The mortgage executed by the two brothers to Vandiveer, the plaintiff, in June, 1870, did not change the adverse nature of Mrs. Stickney's possession, nor operate in any manner to stop the running of the statute.

This mortgage, moreover, is shown to have been executed by the mortgagors during the period of Mrs. Stickney's occupancy and adverse holding, the hostile character of which was not only known to them, but, in its inception, was expressly authorized by their parol release of the deceased sister's interest in the mortgaged lands. The mortgage was therefore void as tending to promote champerty and maintenance by traffic in litigated titles. The rule of law rendering conveyances of lands void, when held adversely, is, in part, one of public policy, designed to "throw obstacles in the way of asserting doubtful rights to the prejudice of occupants.—*Clay v. Wyatt*, 6 J. J. Marsh. 583; *Bernstein v. Humes*, 60 Ala. 582. "It seems," says Chancellor Kent, "to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity as well as the intention to deliver possession."—4 Kent. 448.

To avoid a conveyance on this ground, it is not requisite that such adverse possession should be asserted under any color of title, but only under claim of right. But it must be actual as distinguished from constructive possession.—*Bernstein v. Humes*, 71 Ala. 260; *Eureka Co. v. Edwards*, *Ib.* 248. Nor is it required that the mortgagee, or other purchaser should have actual notice of such adverse holding, in order to vitiate the conveyance. The constructive notice implied from possession is sufficient.—*Bernstein v. Humes*, *supra*.

Nor, yet again, does a knowledge by one in actual possession, claiming title, that his title is defective, avail to destroy its adverse character. The test is the actual claim, and not the bona fides of it, in all cases, at least, where the possession is actual and not merely constructive.—*Smith v. Roberts*, 62 Ala. 83; *Alexander v. Wheeler*, 69 Ala. 332; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232.

These principles are all pertinent to the present case, and were recognized in the rulings of the court.

The doctrine settled in this State is, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. The reason is, as observed in a former decision, that an inquiry of the occupant will be likely to lead to a knowledge of the fact that he is a mere tenant, holding, not in his own right, but in the right of another who is his land-

lord.—*Brunson v. Brooks*, 68 Ala. 248; *Pique v. Arendale*, 71 Ala. 91; *Wade on Notice*, secs. 284-286; *Burt v. Cassety*, 12 Ala. 734.

It was immaterial, therefore, that the mortgagors were in the temporary occupancy of a portion of the property sued for at the time of the execution of the mortgage, in the year 1870, provided they entered after the commencement of Mrs. Stickney adverse possession, and as mere tenants, fully recognizing the superiority of her title as owner and landlord. Purchasers from tenants are as fully precluded as the tenants themselves from disputing the title of their landlord.—*Taylor's Land. & Ten.* sec. 91; *Bishop v. Lalouette*, 67 Ala. 197. The principle settled in *McCarthy v. Nicrosi*, Ala. 332, does not conflict with this view. There the possession of the vendor and purchaser was joint, both being in actual possession at the time the deed was executed. It was held that, inasmuch as there was no visible change of possession, a third person purchasing would not be charged with constructive notice of the unrecorded deed of the first vendee. If, however, the vendor had openly and visibly yielded exclusive possession to the vendee, and had afterwards gone in as a mere tenant, the rule would have been otherwise. Such is this case, in fact as well as in principle and legal effect.

Judgment affirmed.

New York Real Prop. Law, § 225. EFFECT OF GRANT OR MORTGAGE OF REAL PROPERTY ADVERSELY POSSESSED—A grant of real property is absolutely void, if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

Stoddard v. Whiting, 46 N. Y. 627, 634; *supra* p. 28.

RUSSEL v. RUSSEL.

[1 *Brown Chancery* 269—1783.]

A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the Statute of Frauds.

LORD LOUGHROROUGH: In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.

ASHURST, Lord Commissioner: Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose on reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security.*

BURDICK v. JACKSON.

[7 Hun. 488—1876.]

Appeal from a judgment entered on the report of a referee dismissing the complaint.

The action was brought by the plaintiff as assigned in bankrupt, cy, to set aside a mortgage given by the bankrupt to his nieces, the defendants, Ida J. Jackson and Carrie A. Jackson, on the ground that it was a fraudulent preference under the bankrupt act. The mortgage was executed eighteen days before the filing of the petition in bankruptcy, but was given in pursuance of a parol agreement between the bankrupt and the guardian of the infants more than fifteen months before.

GILBERT, J.: We concur fully with the referee in his conclusions of fact and of law. One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held that an agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land. (Story Eq. Jur., s. 553; Russell v. Russell, 1 Bro.C. C., 269, and notes to that case in 1 Lead. Cases Eq., 541; Read v. Simons, 2 Desauss., 552; Welsh v. Usher, 2 Hill Eq., 167; Dow v. Ker, 1 Spen. Esq., 414; Bank v. Carpenter, 7 Ohio, 21; *in re Howe*, 1 Paige, 125; Chase v. Peck, 21 N. Y., 581; Willard, Eq., (Potter's ed.) 441, *et seq.*) If, therefore, the agreement of December, 1871, had been made directly with the defendants, Ida and Carrie, there can be no question that it would have given them a specific equitable lien upon the land in controversy, which would have been prior and paramount to the title of the plaintiff, and to the general liens of the judgment creditors whom he represents. Having been made with their guardian while they were infants,

*"The case of Russell v. Russell is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence which the very object of the Statute of Frauds was entirely to exclude." Eldon, L. Ch., in *Ex parte Haigh*, 1 Ves. 402. Compare *Ex parte Hooper*, 1 Meriv. 7. *supra*, p. 48.

it inured to their benefit and was well executed by the mortgage to them. Conceding that while the agreement remained executory it was within the statute of frauds, and so not enforceable, for the reason that it was not in writing, yet, when the promisor actually executed the agreement, by the delivery of a formal mortgage, all objection to its validity, on that ground, was removed, and the agreement became as effectual for all purposes, as if it had been reduced to writing originally. (Siemon v. Schurek, 29 N. Y., 598; Dodge v. Wellman, 1 Abb., Ct. App Dec., 512; *In re Howe*, *supra*; White v. Carpenter, 2 Paige, 217; Arnold v. Patrick, 6 id., 310). Under our statute a parol agreement, in respect to lands, cannot be avoided in equity, because it is not in writing, where there has been a part performance of it. (Freeman v. Freeman, 43 N. Y., 34). *A fortiori*, it cannot where it has been fully executed. The plaintiff is not a *bona fide* purchaser, but stands in the shoes of the bankrupt. He cannot, therefore, assert any better right than the bankrupt himself. The execution of the mortgage gave the defendants a lien, which took effect, by relation, as against the bankrupt and purchasers from him with notice, at the time the agreement to give it was made. The plaintiff, not being a *bona fide* purchaser, took the transfer to him subject to that lien. That being so, no question of fraud or of a preference in violation of the provisions of the bankrupt act has arisen, and the evidence precludes any inference of other kinds of fraud. It is unnecessary to review the cases cited on behalf of the appellants, for none of them seem to us to conflict with the foregoing views.

The plaintiff is not in a position to raise the objection that the agreement to discharge the old mortgage, and to receive the new one in lieu of it, was invalid because the guardian violated his duty and transcended his power in making such an agreement. Such a transaction is not absolutely void, but is avoidable only, at the election of the infants on coming of age. It being obviously for the benefit of the infants that the lien shall be established and upheld, we will give effect to the intendment, that their ratification will be forthcoming at the proper time, and to the rule that no one but themselves can disavow the authority of their guardian to make the agreement. (Co. Lit., 2 b; 2 Kent Com., 236; Keane v. Boycott, 2 H. Bl., 511; U. S. v. Bainbridge, 1 Mason). The plaintiff has no claim to be the champion or protector of the infants and can acquire no rights by assuming that character.

Some objections to the admission of evidence were taken by the plaintiff. We think they were properly overruled.

The judgment should be affirmed, with costs, to be paid out of the estate of the bankrupt, if that is sufficient; otherwise by the plaintiff personally.

CHASE v. PECK.

[21 N. Y. 581—1860.]

DENIO, J.: The determination of this case will depend upon the character of, and the effect to be attributed to, the instrument executed by Alonzo Aylesworth to Isaac and Sarah Howland, at the

same time that the latter conveyed to him the premises in controversy. From the two papers, taken together, it is apparent that it was parcel of the consideration, upon which the conveyance was executed, that Aylesworth, the grantee, should support the grantors during their joint and several lives. The paper signed by him professes, in the first place, to pledge the entire use of the farm for that purpose; and it is added that, if its produce shall be insufficient for the object, the entire fee shall be appropriated to accomplish it. It was, probably, intended that the transaction should operate, to a certain extent, as a gift; but this was only so far as the value of the property conveyed should exceed the value of the return which was to be made for it. As respected the latter, the arrangement was a contract, which imposed a certain duty upon the grantee, to be performed for the benefit of the grantors, and which, moreover, attempted to create a lien upon the subject of the conveyance, to secure the performance of the duty undertaken by the grantee. The intention of the parties is plain; but the question to be considered is, in what legal or equitable light the arrangement is to be regarded by the Court. In our opinion, the instrument signed by Aylesworth is to be considered as creating an equitable incumbrance in the nature of a mortgage.

By the law of England, as administered in the Court of Chancery, an equitable mortgage may be created by any writing from which the intention to create it may be shown; or it may be effected by a simple deposit of title deeds without writing. It will also be allowed in favor of a vendor, for unpaid purchase money or of a purchaser who has advanced his money on the faith of a contract for a conveyance. (Miller on Equitable Mortgages, pp. 1, 2, 218 and cases cited).

The courts of equity in this State have adopted the general doctrines of the English chancery upon this subject, as upon many others. The cases of a mortgage created by a writing not sufficient to convey the premises, or by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or dictum by which it has ever been questioned. In *Jackson v. Dunlap* (1 John. Ca., 114) a vendor of land had executed and acknowledged a conveyance to the vendee, but a part of the purchase money had not been paid, and it was then agreed that the grantor should retain the deed until the balance should be actually paid. It was equivocal upon the testimony whether the deed had been delivered so as to pass the title or not. If it had not been, the question we are considering would not arise; but Kent, Ch. J., considered the delivery complete, and that the deed was then retained by the grantor by way of security till payment. This, he said, was the creation of an equitable lien in the grantee. The other judges seem to have been of opinion that the title did not pass. In *Jackson v. Parkhurst* (4 Wend., 369,) it was held by the Court, Judge Sutherland giving the opinion, that the pledge or deposit of a deed with the grantor, by way of security, would give him a lien in the nature of a mortgage; but the case being at law, it was held that such a title could

not be set up against the legal estate. In the matter of Howe and wife, (1 Paige, 125) the English doctrine, that an agreement for a mortgage is in equity a specific lien on the land, was asserted and applied by Chancellor Walworth.

The cases in which a lien for the purchase money has been established, where the title had passed to the purchaser, are more numerous. (Garson v. Grear, 1 J. C. R., 308; Warner v. Van Alstyne, 3 Paige, 513; Arnold v. Patrick, 6 Paige, 310; Hallock v. Smith, 3 Barb., S. C. R., 267): These cases proceed upon the same principle which the defendant seeks to establish. The difference in circumstance which exists in the present case is against the plaintiff; for Mr. and Mrs. Howland received back from Aylesworth a written instrument, in which the lien reserved was explicitly stated, while in the cases referred to, the lien was predicated on the implied intention of the parties without a writing or even a verbal agreement for that purpose. Another example of the same doctrine is furnished, where there is an executory contract for the purchase of lands, the title remaining in the vendor; and subsequently to the contract he suffers liens upon the premises to be created. It is well settled, that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer who has advanced money or property without notice of the vendee's equity. (Lane v. Ludlow, 6 Paige, 316, note; Parks v. Jackson, 11 Wend., 442). In such cases the vendee is considered in equity as the owner, and the vendor as his trustee.

ARHEND v. ODIORNE.—[118 Mass. 261—1875.]

Gray, C. J. The plaintiff principally relies upon the doctrine of the English courts of chancery that the vendor of real estate by an absolute deed has a lien thereon for the unpaid purchase money, without proof of any agreement of the parties to that effect.

The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on *mesne* process, nor, except in certain cases or to a limited extent, taken in execution for debt. 2 Bl. Com. 160, 161, 4 Kent Com. (12th ed.), 428, 429.

The English doctrine of vendor's lien has been adjudged not to exist in Maine. Philbrook v. Delano, 29 Maine, 410, 415. And it does not appear to have been ever adopted in any of the New England States, except Vermont, in which, after being affirmed by the court, it has been abolished by the Legislature. Arlin v. Brown, 44 N. H., 10; Perry v. Grant, 10 R. I., 334; Dean v. Dean, 6 Conn., 285; Atwood v. Vincent, 17 Conn., 575; Manly v. Slason, 21 Vt., 271; St. of Vt. of 1851, c. 47; Gen. Sts. of Vt. of 1862, c. 65, Sec. 33.

In *Brown v. Gilman*, 4 Wheat., 255, 290, Chief Justice Marshall treated the question as governed by the consideration whether the doctrine had been adopted by the law of the particular State. And the doctrine has never been affirmed by the Supreme Court of the United States, except where established by the local law, as, for instance, in *Ohio*, *Bayley v. Greenleaf*, 7 Wheat., 46; *Tiernan v. Beam*, Ohio, 383; in *Georgia*, *McLean v. McLellan*, 10 Pet. 625, 640; *Hardin v. Miller*, *Dudley*, 120, and the District of Columbia, *Chilton v. Brand*, 2 Black, 458, the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district has been formed; *Moreton v. Harrison*, 1 Bland, 491; *Redford v. Gobson*, 12 Leigh, 332, although it has since been abolished in Virginia by statute. *Yancey v. Mauck*, 15 Grat., 300.

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 *Sugden on Vendors* (8th Am. ed.) c. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation, and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by bona fide attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on *mesne* process. If any third person has acquired rights in the property, there is no reason why equity, any more than the common law, should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts, in those courts which recognize the existence of a vendor's lien for unpaid purchase money. 1 *Perry on Trusts*, Sec. 235. But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmation.

Bill dismissed.

TEFFT v. MUNSON.
[57 N. Y. 97—1875.]

This was an action to restrain defendants, loan commissioners for Washington County, from foreclosing a mortgage executed to them by Martin B. Perkins and wife.

On the 18th day of January, 1848, Gamaliel Perkins purchased of Cortland Howland certain lands in Washington County, which were conveyed to him by warranty deed recorded March 7, 1848, in the clerk's office of said county. Gamaliel Perkins, immediately after his purchase, let his son, Martin B. Perkins, into possession of

the premises, who forged a deed of the land from his father to himself and placed it upon record in the clerk's office of said county, May 27, 1850. On the 1st day of October, 1850, Martin B. and his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of \$1,000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seized of a good, sure, perfect, absolute and indefeasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc., and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the County Clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought, and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C.: The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed. *Work v. Welland*, 13 N. H., 389; *Kimball v. Blaisdell*, 5 id., 533; *Somes v. Skinner*, 3 Pick., 52; *The Bank of Utica v. Mersereau*, 3 Barb., Ch., 528, 567; *Jackson v. Bull*, 1 John. Cas., 81, 90; *White v. Patten*, 24 Pick., 324; *Pike v. Galvin*, 29 Maine, 183. And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law, and in such case the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and

thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it, and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyance. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily a nullity, and constructive notice to no one. The plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage. The case of *White v. Patten*, *supra*, is entirely analogous to this. In that case the plaintiff derived his title from a mortgage, made to him by one Thayer, containing covenants of seisin, warranty, etc., and recorded Feb. 19, 1834. At the time of the execution of this mortgage the title was not in Thayer, but in one Perry, his father-in-law. Perry afterward, by deed recorded August 2d, 1834, conveyed the land in fee simple to Thayer, who conveyed the land by mortgage to the defendant, recorded the same day. The counsel for the defendant used the same arguments in a great measure which have been urged upon our attention by the counsel for the plaintiff in this case, both as to the title and the registry of the mortgages, and yet the court held in a very able opinion that the plaintiff had the prior and better title.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

BOOK II.

NATURE AND INCIDENTS OF THE MORTGAGE RELATION.

CHAPTER I.

COMMON LAW RELATIONS.

(a) *Title.*

McMURPHY v. MINOT.

[4 *New Hampshire*, 251—1827.]

Reported, 2 Gray, Cas. Prop. 743.

ASTOR v. HOYT.

[5 *Wend.*, 603—1830.]

SAVAGE, CH. J. The question then arises, which was principally discussed upon the argument, is the mortgagee to be considered the assignee of the leasehold premises? And if so, is he liable to the payment of the damages for the breach of Maddn's covenant? That the covenant to pay all assessments is a covenant running with the land there can be no doubt (5 Co., 25); and that the assignee is liable for the breach of such a covenant occurring while he is assignee is equally clear; but whether the mortgagee is assignee, and if assignee, whether he is liable for breaches of the covenant before the assignment, are questions to be discussed. In England I think it must be conceded to be settled that wehre the mortgagor, by the form of the instrument, conveys or assigns by way of mortgage his whole estate, the mortgagee is considered, at law and in equity too, the assignee. We read, indeed, in some of the books that though the mortgage purports to convey an estate defeasable by matter subsequent, yet that the courts of equity consider them, in their true intent, as mere securities for money; but the decision of the courts, both of law and equity, which are the highest evidence of what the law is, have generally considered mortgages as conveyances; and by the mode of drawing them there it seems necessary that when the condition is performed there should be a reconveyance or reassignment. In *Sparkes v. Smith*, 2 Vernon, 275, the court refused to compel a mortgagee to disclose whether a lease was assigned to him to enable the plaintiff to prosecute him as assignee upon the covenant of the lessee, who was also mortgagor, clearly implying that as assignee of the whole term, even by way of mortgage, he would be liable; and in *Pilkington v. Shaller*, 2 Vern., 374, where a recovery

had been had in a similar case against the plaintiff as assignee, the court refused to relieve him, saying the mortgagee was ill advised to take an assignment of the whole term. In the case of *Eaton v. Jaques*, Doug., 460, the Court of King's Bench disregarded these cases and thought them not well considered. Lord Mansfield was of opinion that upon principle the assignee is liable only in respect of the possession, and that as a mortgage was a mere security, the mortgagee out of possession was not liable as assignee. About ten years afterwards Lord Thurlow entertained a different opinion, and did what was refused in *Pilkington v. Shaller*. He compelled a person who had received a lease in deposit as security to take an assignment, that he might be prosecuted as assignee upon the covenant of the lessee to build a house. The question seems to have been finally and deliberately settled in *Williams v. Bosanquet*, 1 Brod. & Bing., 72, by ten judges, overruling the doctrine of Lord Mansfield in *Eaton v. Jaques*. Dallas, Ch. J., in giving the decision of the court, states explicitly the grounds of the decision. "He shows from authority that the lessee is liable for the rent, whether he enter or not; he is liable by virtue of his lease, and he argues that the assignee is under the same liability, whether he takes an absolute assignment or only by way of security, for the lessee conveys by the assignment his whole interest, which the assignee takes; and as the lessee was liable before entry, so must the assignee be liable in like manner. In that case, he remarks, the assignment was of all the right, title and interest of the assignor, and so completely did the interest pass that there was a covenant to reassign upon payment of the money. The money was not paid before the day when, if not paid, the assignment was to become absolute, so that the case was that of an absolute assignment. He also held there was a privity of estate, for the acceptance of the assignment was equal to actual entry and privity of contract, because contract was with the lessee and his assigns, and the defendants were such assigns; therefore the contract was between the lessor and assignee.

Chancellor Walworth considers the case of *Williams v. Bosanquet* as settling the principle in England that a mortgagee of leasehold premises, whether in possession or not, is liable upon the covenants as assignee, but he thinks such a principle cannot prevail in this State, because we hold the mortgagor to be the true owner, and the mortgagee as having nothing but a chattel interest while out of possession. The counsel for the appellant insists, however, that in that respect there is no difference in the doctrine held in England and here, for Lord Mansfield said in *The King v. St. Michaels*, Doug., 632, it was an affront to common sense to say the mortgagor is not the real owner. Such was indeed the doctrine of Lord Mansfield and of Buller, justice, but that is the very doctrine that is repudiated in *William v. Bosanquet*. Lord Mansfield asserts that the mortgagor is the real owner. Not so, says Ch. J. Dallas, giving the opinion of the ten judges; the whole interest is assigned; it vests absolutely, and is not the less absolute because the assignor (the mortgagor), may entitle himself to a reassignment. Unless, therefore, a man can be the real owner after he has parted with all his interest,

the chancellor must be right in saying that the English doctrine of the ten judges is inapplicable here. If the law is the same here as in England, and the law there is that the mortgagee out of possession has the whole estate, then this court was in error in the case of *Waters v. Stewart*, 1 Caines' Cas. in Err., 47, where they decided that the equity of redemption remaining in the mortgagor was real estate, and liable to be sold on execution; and the Supreme Court were equally in error when they decided that the mortgagee out of possession had no interest which could be sold on execution (*Jackson v. Willard*, 4 Johns. R., 41), for if he had the whole estate it certainly might be sold. It would seem, too, that Powell must have been under a great mistake when he stated that the mortgagor might levy a fine or suffer a common recovery; that he had an estate which descended to his heirs, and which he might devise by his will. *Powell on Mortgages*, 75, 76, 170.

Here, however, the mortgagor is the owner against all the world, subject only to the lien of the mortgagee. In *McIntyre v. Scott*, 8 Johns. R., 159, it was held that the mortgagee of a ship, out of possession, was not liable for supplies; and in *Runyan v. Mersereau*, 11 Johns. R., 538, the assignee of the mortgagor was permitted to maintain trespass against the mortgagee after condition broken. The court conclude their opinion in that case by saying: "The light in which mortgages have been considered in order to be consistent, necessarily leads to the conclusion that the freehold must be considered in the plaintiff, and he of course is entitled to judgment. In that case the court rely on the doctrines of Lord Mansfield in *Eaton v. Jaques*, and to show that the interest of the mortgagee is only a chattel interest, they refer to the well established principles that mortgages pass by a will not made with the solemnities of the statute, and that the assignment of the debt draws the land after it. In *Coles v. Coles*, 15 Johns. R., 320, *Spencer, J.*, repeats the doctrine of *Runyan v. Mesereau*, and in that case it was decided that the wife might be endowed out of equity of redemption. In *Hitchcock v. Harington*, 6 Johns. R., 295, *Kent, Ch. J.*, says of the mortgage: "We now regard the mortgage estate only for the benefit of the mortgagee and his assigns. As to the rest of the world, as long as it is not put in force, it is only a pledge or lien on the bond, with which they have no concern any further than not to disturb it." And in *Dickinson v. Jackson*, 6 Cowen, 147, we held that until default in payment of the money due by the mortgage, or some part thereof, and the termination of a notice to quit, the mortgagee has no right of entry as against the mortgagor, and cannot bring ejectment against him, though he may against the assignee of the mortgagor, the tenancy being broken by the assignment. It is too late for us now to retrace our steps and adopt the doctrine of *Williams v. Bosanquet*, even if it was correct. To recover against an assignee of the lessee it must be averred and proved that all the right, title and interest of the lessee passed by assignment to the assignee. After these decisions, can we say that all the right, title and interest of the mortgagor has passed to the mortgagee out of possession? So far from it, we hold that the mortgagee, before foreclosure or

the commencement of proceedings to foreclose, has but a chattel interest. It is perfectly clear, therefore, that a mortgagee of a term out of possession is not in this State to be considered the assignee.

HUNTINGTON v. SMITH.—[4 Conn. 235—1822.]

HOSMER, CH. J. On the first plea in the case before us the only question is, whether after the expiration of the law day, and before an entry or foreclosure, the interest of a mortgagee in the premises mortgaged may be set off on execution.

The fee simple of the land is in the mortgagor, and the mortgagee, before entry of foreclosure has, at most, a chose in action, and a right to the possession, in order to render the mortgage available to the payment of his debt. The mortgage is an incident only to the debt, which is the principle. It cannot be detached from it; distinct from the debt, it has no determinate value, and the assignee must hold it, at the will and disposal of the creditor, who has the note or bond, for which it is a collateral security. The debt may require only a small part of the land to satisfy it, and by the levy of several executions the mortgagor desiring to redeem may be much embarrassed. The land cannot be taken for the debts of the mortgagee until his entry upon it, and, in my opinion, until foreclosure. These principles are so thoroughly established, and so frequently has it been decided directly that mortgaged premises not entered upon by the mortgagee or foreclosed cannot be taken for his debts that a more extensive investigation of the subject is unnecessary. *Fish v. Fish*, 1 Conn. Rep., 559; *Portland Bank v. Hall*, 13 Mass. Rep., 207; *Blanchard v. Colburn & al.*, 16 Mass. Rep., 345; *Jackson v. Willard*, 4 Johns. Rep., 41; *Jackson v. Dubois*, 4 Johns. Rep., 216; *Hitchcock v. Harrington*, 6 Johns. Rep., 290; *Collins v. Torrey*, 7 Johns. Rep., 278.

EATON v. WHITING, 3 Pick. 484 (1826).

Parker, C. J., delivered the opinion of the court. The opinion expressed in the case of *Blanchard v. Colburn & ux.*, 16 Mass. Rep., 345, that the interest of a mortgagee in real estate mortgaged to him for security of a debt, or the performance of a condition, is not liable to be levied upon for the debts of the mortgagee and so, of course is not liable to attachment on *mesne* process, we see no cause to change. It is in fact but a chose in action, at least until entry to foreclose, and although the legal effect of the mortgage is to give an immediate right of entry or of action to the mortgagee, yet the estate does not become his, in fact, until he does some act to divest the mortgagor, who, to all intents and purposes, remains the owner of the land until the mortgagee chooses to assert his right under the deed. It is, as before said, in the nature of a pledge, and a pawn or pledge cannot be seized in execution for the debt of the pledgee. The mortgagor may be compelled to pay over the debt to the creditor of the mortgagee on the trustee process, with the same exceptions as are provided for other cases, and payment under such process will discharge the mortgage *pro tanto*; so that the creditor of the mort-

gagee is not without remedy, as has been suggested. The law in New York and Connecticut is the same as with us. In the courts of both those States it has been decided that a mortgagee before entry has not such an interest in the land as can be sold, levied upon, or attached. See *Jackson v. Willard*, 4 Johns. Rep. 41; *Runyon v. Mersereau*, 11 Johns. Rep. 534; *Johnson v. Hart*, 3 Johns. Cas. 329; also *Huntington v. Smith*, 4 Connect. Rep. 237, in which Hosmer, C. J., states at large reasons, similar to those given in *Blanchard v. Colburn & ux.* by this court. Before the case of *Blanchard v. Colburn & ux.* the same principle have been decided in the case of *Portland Bank v. Hall*, 13 Mass. Rep., 207. So that we are warranted in considering it as settled law, that the interest of a mortgagee before entry is not attachable; and we might add with Hosmer, C. J., in the case cited from Connect. Rep., that we doubt whether it is attachable before foreclosure, for until then all the inconveniences suggested as the ground of decision would occur.

TRIMM v. MARSH.

[54 New York, 599.—1874.]

This was an action for an accounting as to the amount due upon a bond and mortgage, and for the recovery of the possession of the mortgaged premises, upon payment of the amount due.

In 1858 one Ridgeway, being the owner of certain premises situate in the City of New York, mortgaged them to an insurance company to secure \$2,000; the insurance company assigned the mortgage to the defendant, Sarah A. Marsh. Ridgeway afterward conveyed the premises to the plaintiff Brown, who subsequently, in October, 1865, entered into an agreement with plaintiff Trimm to convey the same to him. In 1861 the defendant, Sarah, commenced an action to foreclose this mortgage, making plaintiff, Brown, and others parties, and obtained judgment of foreclosure. The premises were sold under the judgment in 1862, and defendant, Sarah A. Marsh, became the purchaser, and received a sheriff's deed. Immediately after the sale she entered into possession of the premises, and she or the other defendant has ever since been in possession. In October, 1864, by an order of the Supreme Court, granted after due notice and hearing the parties interested, the foreclosure sale was set aside and declared null and void, and a resale was ordered, which never took place. In November, 1864, the defendant, Sarah A. Marsh, recovered a judgment against plaintiff, Brown, which was duly entered and docketed, and in 1865 she caused an execution to be issued upon said judgment to the Sheriff of New York, who, in May of the same year, sold "all right, title and interest" of which the said Elezabeth C. Brown was seized or possessed in the said land, the said Sarah A. Marsh becoming the purchaser and taking the sheriff's certificate of sale. In September, 1865, she conveyed the said premises by deed to the other defendant, and in September, 1866, after the commencement of this suit, she also transferred to him the sheriff's certificate, and he soon after received the sheriff's deed. The defendant, William B. Marsh, had notice of all the facts when he took him title, and was not a *bona fide* purchaser for value. Since the

defendants went into possession of the premises they have assumed and claimed an absolute title, free from any right of redemption in the plaintiffs or either of them.

The plaintiffs commenced this action to redeem the said premises from the mortgage and judgment of foreclosure, and the principal defence relied on by the defendants was their title under the judgment and execution sale against plaintiff Brown. The referee decided the same in favor of plaintiffs, holding that the execution sale, being made by the assignee of the mortgagee in possession, was null and void and conferred no title upon the purchaser.

EARL, C. The only legal proposition involved in the case, which we deem it important to consider, is whether a mortgagee of real estate in possession can cause the equity of redemption of the mortgagor to be sold on an execution and become the purchaser of the same, and, after obtaining the sheriff's deed, set up his title thus acquired against the claim of the mortgagor to redeem from the mortgage in an equitable action commenced by him for that purpose; or, to state the proposition in other words, has the owner of the equity of redemption of mortgaged premises, after default and after the owner of the mortgage has taken possession, such an interest in the premises as can be sold upon execution against him? If this question be answered in the affirmative, the decision of the General Term was right and must be affirmed.

The respective rights of the mortgagor and mortgagee in the land mortgaged have been the subject of much discussion, and it is impossible to reconcile all that learned judges and writers have said upon the subject. By the common law of England the legal estate was vested in the mortgagee, to be defeated by the performance of a condition subsequent, to-wit, payment at the law day. In default of such payment, the title became absolute and irredeemable in the mortgagee. But, two centuries ago, courts of equity assumed jurisdiction to relieve mortgagors against forfeitures, and, thenceforth, in equity a mortgage has been regarded as a mere security, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself.

These equitable principles have had an increasing influence upon courts of law, and Chancellor Kent says that "the case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." (4 Kent's Com., 158.)

The common-law rule, as modified by the equitable principles above alluded to, still prevails in England. There the courts still hold that the legal title passes to the mortgagee, and becomes by default absolutely vested in him at law, and that the mortgagor has, after default, nothing but an equity of redemption to be enforced in a court of equity. After default the mortgagor can again become reinvested with the title to his land only by a reconveyance by the mortgagee. The same rule prevails in the New England States, and in many of the other States of the Union. But this common-law rule has never, to its full extent, been adopted in this state.

Here the mortgagor has, both in law and equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature. (Waters v. Stewart, 1 Caine's Cases in Error, 47; Jackson v. Willard, 4 John., 42; Runyan v. Mersereau, 11 id., 534; Astor v. Hoyt, 5 Wend., 603; Packer v. Rochester and Syracuse Railroad Co., 17 N. Y., 283-295; Kortright v. Cady, 21 id., 343; Power v. Lester, 23 id., 527; Merritt v. Bartholick, 36 id., 44.)

Prior to the Revised Statutes the mortgagee could maintain ejectment to recover the mortgaged premises. This right has been taken away (2 R. S., 312), and now the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure. It is not disputed that before possession taken by the mortgagee the mortgagor has an interest in the real estate which can be sold upon execution; that his widow is entitled to dower; that he can convey and devise his interest as real estate; that at his death it descends to his heirs; that he has every attribute and right of an absolute owner of the real estate, subject to the lien of the mortgage, and that his title can be defeated only by foreclosure. It is not disputed that the mortgagee before possession taken has only a chose in action; that he holds the mortgage only as security for the debt; that he can sell the bond and mortgage by mere delivery as personal property; that at his death they pass to his personal representatives as a portion of his personal estate; that he has no such estate in the land as can be sold on execution, or as he can give his widow dower; and that he has no attribute or ownership in the land. It was said by Judge James, in *Power v. Lester* (*supra*), that "a mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. A mortgage is but a chattel interest; it may be assigned by delivery, and cannot be seized and sold on an execution." Judge Pratt says, in *Packer v. The Rochester & Syracuse Railroad Company* (*supra*), that "a mortgagee has a mere chose in action, secured by a lien upon the land. Since the Revised Statutes there is no attribute left in the mortgagee, before foreclosure, upon which he can make any pretense for a claim of title. For the mere right, when he goes into possession by the consent of the mortgagor, to retain possession, is not an attribute of title. He would have the same right in case of a pledge."

At common law, payment or tender at the law day extinguished the lien of the mortgage and reinvested the mortgagor, without a reconveyance by the mortgagee, with his title. But tender or payment after the law day did not have this effect, and in such case reconveyance was necessary; and such is still the rule in England and in many states of the Union. But it has always been the law of this state that payment or tender, at any time after the mortgage debt became due and before foreclosure, destroyed the lien of the mortgage and restored the mortgagor to his full title. As the mortgagee had no title, a reconveyance was not required by the law as ex-

pounded by our courts. So that here the term law day, which occupies such a prominent place in the early discussions as to mortgages, has no particular significance. The mortgagor has his "law day" until his title has been foreclosed by sale under the mortgage, and it is a misnomer in this State to call the mortgagor's right in the land, before or after default, an equity of redemption; a mere right to go into equity and redeem. This was a proper description of the mortgagor's right in the land according to the law as expounded in England. But in this State the interest of the mortgagor in the land is the same before and after default, and is a legal estate, with all the incidents and attributes of such an estate.

But it is claimed by the learned counsel for the appellants that the position of the mortgagee is materially changed when he gets possession. It is true, notwithstanding the provision of the Revised Statutes, which prohibits an action of ejectment by the mortgagee to obtain the possession of the mortgaged premises, that after he has lawfully obtained the possession he may retain it until the debt secured by the mortgage has been paid. Before taking possession the mortgagee has no title in the lands. How can the mere possession change the title from the mortgagor to the mortgagee, or in any way diminish the estate of the one or enlarge the estate of the other? Before taking possession the mortgagee had a mere lien upon the real estate pledged for the security of his debt. After possession he has in his possession the property pledged as security, the title remaining as it was before. The mortgagor's title is still a legal one, with all the incidents of a legal title subject to the pledge, and the mortgagee's interest is still a mere debt secured by the pledge. If the mortgagee should die in possession, the debt would still go to his personal representatives to be administered as personal estate, and the mortgagor's title would go to his heirs. Payment, or even tender, would destroy the mortgagee's right to retain possession, and would enable the mortgagor to maintain ejectment to recover possession. The mortgagee, in such case, so far from having any title, holds the land as the land of the mortgagor, and is liable to account to him for the rents and profits. Judge Comstock, in *Kortright v. Cady* (*supra*), says: "The mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or retain possession of the pledge for the purpose of paying the debt. Such a right is but the incident of the debt, and has no relation to a title or estate in land. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagor, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but where its object is accomplished it is neither just nor lawful for an instant longer."

I cannot doubt, therefore, that the mortgagor, after default, and after the mortgagee has taken possession, has such an estate in the land as can be sold upon execution. It is not necessary to decide whether, in such case, the mortgagee has also such an estate in the

land as can be sold upon execution, because, if he has, it does not follow that the mortgagor has not also such a right. They might each own an estate which could be sold. But I am of opinion that the mortgagee has no estate in the land which can be sold on execution. His interest is a mere chose in action, a debt secured by a pledge of real estate. His debt is not merged in the real estate by his possession. He has no interest in the real estate which he can sell, or which can be sold separate from the debt. Such a sale would convey nothing. Whoever took the real estate from him would take it subject to the same liability as he was under to account for the rents and profits to the mortgagor. It has been decided that a transfer of the mortgage without the debt is a mere nullity. (*Merritt v. Bartholick, supra.*)

The fact that at the time of the execution sale, the defendants were in possession, claiming the absolute title, can make no difference, as land held adversely to the true owner can be sold upon execution against him. (*Tuttle v. Jackson*, 6 Wend., 213; *Truax v. Thorn*, 2 Barb., 156.)

I am, therefore, of the opinion that the title of the defendant under the execution sale was valid, and that the plaintiff had no right to redeem.

The order of the General Term must be affirmed, and judgment absolute rendered against the plaintiffs, with costs. *

DOLLIVER v. ST. JOSEPH INSURANCE CO., 128 Mass., 315 (1880). Mortgagor of real property insured the same under a policy, wherein he represented himself as having "the entire, unconditional and sole ownership" of the property. It was held that there was no misrepresentation.

SOULE, J.

It has long been settled in this commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession. *Willington v. Gale*, 7 Mass., 138; *Waltham Bank v. Waltham*, 10 Met., 334; *White v. Whitney*, 3 Met., 81; *Ewer v. Hobbs*, 5 Met., 1; *Henry's case*, 4 Cush., 257; *Howard v. Robinson*, 5 Cush., 119; *Buffum v. Bowditch Ins. Co.*, 10 Cush., 540; *Farnsworth v. Boston*, 126 Mass., 1. This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and as he had no joint tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere incumbrances to his title, not affecting its char-

*The elaborate dissenting opinion of Gray C., arguing for the legal character of the mortgage estate especially after default and entry, is omitted.

acter as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.

CHAPPELL *v.* JARDINE.—[51 *Conn.* 64—1884.]

PARK, C. J. This is a suit for the foreclosure of certain mortgaged premises, constituting an island, known as Ram Island, in Long Island Sound. The complaint alleges that the land mortgaged, at the time the deed was given, lay in the town of Southold, Suffolk County, in the State of New York, and it is averred that the mortgage was recorded in the office of the clerk of Suffolk County, in that State. It is further alleged that Ram Island, by the recent establishment of the boundary line between the State of New York and this State, has become a part of the town of Stonington, in this State. The complaint is demurred to, so that the averment stands admitted that the island was, when the mortgage was made, a part of the State of New York.

The mortgaged premises having been in the State of New York when the mortgage was made, it is of course to be governed in its construction and effect by the laws of that State then in force. In *McCormick v. Sullivant*, 10 Wheat., 192, the court says: "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another." The same doctrine is held in *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat., 565; *Darby v. Mayer*, 10 id., 465, and in many other cases. Indeed, the doctrine is unquestioned law everywhere.

Now, according to the laws of the State of New York then and still in force, a mortgage of real estate creates a mere chose in action, a pledge, a security for the debt. It conveys no title to the property. The claim of the mortgagee is a mere chattel interest. He has no right to the possession of the property. The title and *seisin* remain in the mortgagor, and he can maintain trespass and ejectment against the mortgagee, if he takes possession of the property without the consent of the mortgagor.

Now it is clear that there is no remedy by way of foreclosure known to our law which is adapted or appropriate to giving relief on a mortgage of this character. Our remedy is adapted to a mortgage deed which conveys the title of the property to the mortgagee, and when the law day has passed the forfeiture, stated in the deed, becomes absolute at law, and vests a full and complete title in the mortgagee, with the exception of the equitable right of redemption, which still remains in the mortgagor. The object of the decree of foreclosure is to extinguish this right of redemption if the mortgage debt is not paid by a specified time. The decree acts

upon this right only. It conveys nothing to and decrees nothing in the mortgagee if the debt is not paid. After the law day has passed the right of redemption becomes a mere cloud on the title the mortgagee then has, and when it is removed his title becomes clear and perfect. *Phelps v. Sage*, day, 151; *Roath v. Smith*, 5 Conn., 136; *Chamberlain v. Thompson*, 10 id., 244; *Porter v. Seeley*, 13 id., 564; *Smith v. Vincent*, 15 id., 1; *Doton v. Russell*, 17 id., 146; *Cross v. Robinson*, 21 id., 379; *Dudley v. Caldwell*, 19 id., 218; *Colwell v. Warner*, 36 id., 224.

What effect would such a decree produce upon a mortgage like the one under consideration, where the legal title remains in the mortgagor, and nothing but a pledgee's interest is in the mortgagee, even after the debt becomes due? It could only extinguish the right of redemption, if it could do that. It could not give the mortgagee the right of possession of the property, for the mortgagor has still the legal title, which carries with it the right of possession. It would require another proceeding in equity, to say the least, to dispossess him of that title, and vest it in the mortgagee. Hence it is clear that full redress cannot be given the plaintiff in this proceeding.

But the plaintiff has a lien on the property in the nature of a pledge to secure payment of the mortgage debt. And although our remedy of strict foreclosure may not be adapted to given redress to the plaintiff through the medium of such a lien, still a court of equity can devise a mode that will be appropriate, for it would be strange if a lawful lien upon property to secure a debt could not be enforced according to its tenor by a court of chancery. It is said that every wrong has its remedy; so it may be said that every case requiring equitable relief has its corresponding mode of redress. We have no doubt that a court of equity has the power to subject the property in question to the payment of this debt, upon a proper complaint adapted to the purpose. When personal property is pledged to secure the payment of a debt, it may be taken and sold that payment may be made, after giving the pledger a reasonable opportunity for redemption. So here, we think a similar course might be taken with this property. Such a course would fall in with the original intent of the parties, and with the civil code and mode of procedure of the State of New York. Modes of redress in that State have of course no force in this State, but such a mode of procedure seems to be adapted to a case of this character.

And we further think that on an amended complaint, setting forth all the essential facts, and praying that if there shall be a default in redeeming the property during such time as the court shall allow for redemption, then the right of redemption shall be forever foreclosed, and in the legal title and possession of the property be decreed in the mortgage, such course might be taken.

We think either of the modes suggested might be pursued, but inasmuch as the course which has been taken leaves the legal title and possession of the property in the mortgagor, we think the court erred in holding the complaint sufficient, and in passing the decree thereon.

This action was brought to restrain defendants from obstructing the light and air from the windows of plaintiff's church edifice, adjoining a lot owned by said defendant, Rhoda E. Mack. Plaintiff was formerly owner of said lot, which was subject to a mortgage given to one Bell. It conveyed the same to defendant, John Mack, subject to the mortgage which the grantee assumed and agreed to pay. By the deed an easement was reserved of light and air to the grantor's church so long as its premises were used for church purposes. Mack conveyed to a third person, who, on the same day, conveyed to Rhoda E., wife of said John Mack. Her deed was made subject to the Bell mortgage, but contained no assumption of the same by her. The holder of the mortgage, at the request of defendants herein, foreclosed the mortgage by suit; plaintiff was made a party defendant therein. Judgment of foreclosure in the ordinary form was entered, and upon the sale under it Mrs. Mack became the purchaser and received the referee's deed. Mrs. Mack thereafter erected a fence upon her lot, which cut off the light from the basement windows of plaintiff's church.

FINCH, J. It is conceded that a purchase under the foreclosure of the Bell mortgage would have given to a stranger to the title an ownership discharged of the plaintiff's easement. That the same result attends the purchase by Mrs. Mack, notwithstanding her relation to the property, follows from the reason upon which the conceded rule is founded. The statute provides that the deed given in pursuance of a sale on foreclosure shall vest in the purchaser "the same estate (and no other or greater) that would have vested in the mortgage if the equity of redemption had been foreclosed," and further declares that such deeds shall be as valid as if executed by the mortgagor and mortgagee. The construction to be put upon these two provisions was early settled in this court. (*Brainerd v. Cooper*, 10 N. Y. 358; *Packer v. The Roch. & Syracuse R. R. Co.*, 17 id. 287.) In the last of these cases it was said that where legal title is concerned, a mortgage, which for many other purposes is a mere chose in action, is a conveyance of the land; that the interest remaining in the mortgagor is an equity, and that the foreclosure cuts off and extinguishes that equity, and leaves the title conveyed by the mortgage. It was added that such was precisely the effect of a strict foreclosure, and that in construing the statute its two clauses were to be read in harmony. It was, therefore, decided that when the act says the master's deed "shall have the same validity as if executed by the mortgagor, it is not to be taken that the purchaser is to be considered as holding under the mortgagor by title subsequent to the mortgage in a sense which would subject him to the effect of the mortgagor's acts intermediate the mortgage and foreclosure." While it is clearly the modern doctrine that the mortgagee has by virtue of his mortgage no estate in or title to the land, or the right of possession before or after the mortgage debt becomes due (*Ten Eyck v. Craig*, 62 N. Y. 421), and only acquires

such title by purchase upon the foreclosure sale, yet the character and extent of his title so acquired is described in the statute by a reference to the old rule and the old practice, when the mortgagor's right could be fitly termed an equity of redemption which could be foreclosed, leaving an absolute estate in the mortgage. The effect of the foreclosure deed, therefore, as determined by the statute, is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent incumbrances and conveyances of the mortgagor. And thus, while the plaintiff corporation held title to the Mack lot, they held it subject to the Bell mortgage and to the absolute title into which that mortgage might ripen by a foreclosure and sale. When they sold to Mack, reserving in easement in the lot for light and air to their adjoining windows, they held their easement, and Mack held his ownership, still subject to the Bell mortgage and the absolute title into which it might be turned. Mack had assumed the payment of the Bell mortgage, but conveyed through a third person to his wife, subject to that mortgage, but without any liability for its payment assumed by her. Upon its foreclosure she became the purchaser and took the deed. That vested in her, under the statute provision, the title of the mortgagor and mortgagee unaffected by the intermediate acts of the mortgagor and those succeeding to his interest, unless there be something in her position which subjects her to a different rule.

The statute allowed her to be a purchaser, and in determining the effect of the foreclosure deed its terms draw no distinction among purchasers. It does not discriminate. Whoever may lawfully purchase becomes the purchaser whose title is described and determined, and we have no warrant in the facts to take Mrs. Mack out of the statutory protection.

The argument of the General Term, and of the learned counsel for the respondent on this appeal were both aimed at the result of converting her purchase into a mere payment and discharge of the mortgage lien, and her deed into a release of the incumbrance. The General Term reached the result by a disregard of the first clause of the statute declaring the effect of the deed, and what seems to us a misinterpretation of the second clause. In brief, the reasoning was that the deed was to be equivalent to one made by the mortgagor and mortgagee; that the mortgagor had already conveyed and his title incumbered by an after constituted easement had reached Mrs. Mack; that she could not be said to purchase what she already had; that so her deed was only equivalent to one made by the mortgagee, and he having no title, but merely a lien, the foreclosure deed operated only as a release to Mrs. Mack, however it might operate as to a stranger. We deem this reasoning defective in two respects. It construes the statute to transfer the mortgagor's title as it stood, not at the date of his mortgage, but burdened with its after incumbrances and limitations, imposed by him or his grantees; and it assumes what is not true, that Mrs. Mack already had the entire title of the mortgagor, and so could take nothing from him, but only the right of the mortgagee. The mortgagor

had the absolute title incumbered only by the mortgage. That title he transferred to the church, but when the latter conveyed to Mack it reserved an easement or servitude, and so parted with less than it received from the mortgagor. This title Mrs. Mack took, and therefore did not get the entire interest which the mortgagor himself had. There was something which she had not got; which by a foreclosure of the Bell mortgage would pass, and which it was possible for her to purchase.

A further ground is stated which is based upon a theory that Mrs. Mack by virtue of her ownership of the lot came under some obligation to pay off the mortgage, and so could not in equity assert a title founded upon a breach of that obligation. Cases are cited in other States which hold that the mortgagor owes to his mortgagee the duty of paying taxes upon the land and cannot by neglecting their payment and causing a sale and then become a purchaser, cut off the lien of the mortgagee. If the purchase had been made by Mr. Mack, who had assumed the payment of the mortgage, the question would have arisen. But Mrs. Mack owed no duty of payment either to the mortgagee or to the plaintiff. She assumed no such obligation. She violated no duty and incurred no personal liability by omitting to pay off the incumbrance. It was her right and privilege not to do so, and in the omission she did no wrong of which either party could lawfully complain. She had the right to leave the mortgagee to his remedy, and when he asserted it, the law allowed her to become the purchaser, and made no distinction between her rights and those of a stranger to the title.

It was urged that this view of the case left the plaintiff without any power to save its easement, since on the sale Mrs. Mack could safely outbid all others and beyond the mortgage debt. But the plaintiff should not have waited until the sale. When brought into court as a defendant, and certain to be bound by the decree, it should have sought to modify the decree, and showing the peril of its easement and offering to bid the full amount of the mortgage debt and costs upon a sale subject to the servitude, it should have asked that the sale be so made. The mortgagee could not object since the debt would be paid in full and he had no greater right; and Mrs. Mack could have asserted no equity to have the sale so made as to free her from the easement. But when no limitation or condition is imposed by the decree, and no duty of payment rests on the purchaser, the statute determines the estate which passes by the foreclosure deed.

Judgment accordingly.

(b) *Possession.*

KEECH v. HALL.

[1*Douglas*, 21—1778.]

Ejectment tried at Guildhall, before BULLER, Justice, nad verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cases shown, the Court took time to consider; and, now, Lord Mansfield stated the case, and gave the opinion of the Court, as follows:

LORD MANSFIELD: This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the Court to decide, is, whether, by the agreement understood between mortgagors and mortgagees, which is, that the latter shall receive interest and the former keep possession, the mortgagee has given an impled authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor and wrongdoer. No case has been cited where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (Belchier v. Collins); but, there, the mortgagee was privy to the lease, and, afterwards, by a knavish trick, wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity, goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a court of equity must follow not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrongdoer. It is rightly admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; but here the question turns upon the agreement between the mortgagor and the mortgagee; when the mortgagor is left in possession, the true inference to be drawn, is an agreement that he shall posssss the premises at will in the strictest sense, and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If by implication, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction, that the mortgagor shall continue in possessiion. Whoever wants to be secure when he takes a lease, should inquire after

and examine the title deeds. In practice, indeed, (especially in the case of great estates) that is not often done, because the tenant relies on the honor of his landlord; but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the *mesne* profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regards to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment.

The Solicitor-General for the defendant. Dunning and Cowper for the plaintiff.

The rule discharged.

MOSS v. GALLIMORE.

[1 *Douglas* 279—1779.]

In an action of trespass, which was tried before NARES, Justice, at last Assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the Court, on a case reserved. The case stated as follows: One Harrison, being seised in fee, on the 1st of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of £40, payable yearly on the 12th of May; and in May, 1772, he mortgaged the same premises, in fee, to the defendant, Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28, which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3d of January, 1779, one Harwar went to the plaintiff in behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz., on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said, he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the

rent. The question stated for the opinion of the Court, was, whether, under all the circumstances, the distress could be justified.

ASHHURST, JUSTICE: The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstances of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an undertenant; for there can be no such thing as an undertenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant, in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

BULMER, JUSTICE: There is in this case a plea of the general issue, which is given by statute, but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the Court did not consider the mortgagee as tenant at will to all purposes. If my memory does not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. Expressions used in particular cases are to be understood with relation to the subject-matter then before the Court.

JONES v. CLARK.—[20 *Johns*, 51—1822.]

SPENCER, CH. J., delivered the opinion of the Court. The points made by the counsel for the plaintiff in error, are:

1. That there was no sufficient evidence that Jones held under Clark and Stewart.
2. That Howel was an incompetent witness.
3. That the matters shown by the defendant below were a complete defense.

The first and second points may, at once, be disposed of. There was complete evidence of the hiring of the premises by Jones for the second year. Howel was a competent witness to show that he had no beneficial interest in the expired lease, though the fact itself was no wise material.

The cause depends on the third point; and it presents this question, whether a tenant of the mortgagor in possession, and who became such subsequent to the giving of the mortgage, can, in a suit by his landlord, the mortgagor, set up as a legal defense, that after the mortgage became forfeited, he attorned to the mortgagee, and took a lease from him, during the continuance of the lease from the mortgagor. This case has probably been decided in the Court below, on the authority of the case of *McKircher v. Hawley*, (16 *Johns. Rep.*, 289). The principle decided in that case was this:

That a mortgagee could not distrain for rent becoming due under a lease made by the mortgagor subsequent to giving the mortgage, because there was no privity of estate or contract between the mortgagee and such a tenant; and we held, that, to enable a party to distrain for the rent he must have a concurrent right to maintain an action for the rent, and if there was no privity of contract or estate, an action could not be maintained.

When the plaintiff in error attorned to the mortgagees, and took a lease from them, their title to enter under their mortgage was complete; for, the day of payment having passed, the condition was broken, and the estate of the mortgagees was absolute at law. This case, then, presents a very different question from the one decided in *McKircher v. Hawley*. There, the point was, whether the mortgagee could distrain, or, in effect, sue for the rent. Here, it is, whether the tenant of the mortgagor could not, by his own act and consent, become the future tenant of the mortgagees, without any disloyalty to the mortgagor. "At common law," says Mr. Butler, (in note 272 to *Co. Litt.*, 309, a.) "attornment signified only the consent of the tenant to the grant of the seignior; or, in other words, his consent to become the tenant of the new lord." He goes on to show the operation of the statute of *quia emptores*, and the *statute of uses*, and the *statute of wills*; and observes, that the necessity and efficacy of attornments have been almost totally taken away by the statutes of 4 and 5 Anne, c. 16, and 11 George II, c. 19. These two statutes have been re-enacted here. The former does not relate to the case, but the latter has an important and decisive bearing upon it. The 28th section of the statute concerning distresses, rents and the renewal of leases, (1 N. R. L., 443), after reciting that the possession of estates is rendered precarious by the frequent and fraudulent practices of tenants attorning to strangers, by which means landlord and lessors are turned out of possession, and put to the difficulty and expense of recovering possession by suits at law, enacts, that every such attornment shall be null and void, and the possession of the landlords or lessors shall not be deemed to be, in any wise, changed by any such attornment; with a proviso, that nothing therein contained should extend to vacate or effect any attornment made pursuant to and in consequence of any judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or lessor, or to any mortgagee after the mortgage is become forfeited.

The mischief which the statute was intended to remedy, was the attornment by tenants to strangers claiming title; and without the proviso. the construction of the enacting part of the statute would have admitted of no doubt. But to remove every doubt, the Legislature have declared who were not strangers, and to whom the tenant might lawfully attorn; he may attorn to a mortgagee after the mortgage is forfeited. The reason of this is obvious. The mortgagee, as between him and the mortgagor, has the right of entry, and is entitled to the possession of the premises. If, then, the tenant will do voluntarily what the law will coerce him to do, yield up the possession to the mortgagee, it is not an act injurious to the just

rights of the mortgagor, nor disloyal towards him. Indeed, the rights of the tenant also require that he should be allowed to do so; for if he refuses to attorn, he at once subjects himself to eviction, and the payment of costs. The statute makes no difference between a tenant to the mortgagor, who becomes so before or after the execution of the mortgage. It applies to every tenant of the mortgagor, without reference to the time when he became tenant. The reason is the same in both cases, and they are both embraced by the proviso of the statute, and neither of them are within the mischiefs intended by the enacting part of the statute.

Judgment reversed, and a *venire de novo* to be awarded in the court below.

HALL v. DOE *d.* SURTEES.

[5 B. & A. 687—1822.]

This was a writ of error brought to reverse a judgment obtained in ejectment in the Court of Pleas at Durham. The declaration was on a demise by W. Surtees, on the 8th July, 1817, of an undivided third part of certain premises habendum from 7th July, 1817, for seven years, &c. A special verdict was found, stating the following facts: On the 1st May, 1780, one Thomas Labourn being seised for the tenements in question, in fee, mortgaged them to Auburn Surtees, in fee, for the sum of £800, with the usual proviso for reconveyance, if Labourn should pay A. S. the £800, with interest on the 3d. November, 1780, and that Labourn should occupy the premises until default. A default having been made, A. S. thereby became seised in fee by law of the premises, but never entered, and Labourn continued to occupy them until his death. A. Surtees, on the 30th September, 1800, died intestate, and the right to the premises in question descended to W. Surtees, his heir at law. Thomas Labourn died on the 30th June, 1804, and the estate descended to J. Labourn, his son and heir at law, who entered and occupied part of the premises in question, until 1807; the residue being occupied by his mother till her death, in 1813. J. Labourn, in October, 1806, conveyed the premises for a valuable consideration to Michael Hall, the defendant below, and on the 8th October, 1806, a fine was levied with proclamations in the Court of Pleas, in the county palatine of Durham, of the premises in question, to the use of Michael Hall. M. Hall, on the 1st August, 1807, entered and occupied one messuage part of the premises in question, into which Joseph Labourn had entered upon the death of Thomas Labourn, and continued to occupy the same; and immediately after the death of Elizabeth Labourn, in September, 1813, Michael Hall entered into possession, and occupied the residue of the premises in question. W. Surtees, on the 13th July, 1813, demanded of Michael Hall the possession of the same, which he refused to deliver up.

ABBOTT, C. J.: Upon this finding, I am of opinion that this must be considered as an occupation by the permission of the mortgagee; and if so, there was no adverse possession, and the statute of limitations does not apply. The payment of interest would have

been conclusive evidence of a continuing tenancy. That fact is not found by the jury; but that is not the only ground upon which the Court can proceed. If there were any circumstances from which the jury might have presumed that the premises were not occupied by the permission of the mortgagee, they ought to have found that fact. Here, however, is nothing to justify us in presuming that this occupation was not by the permission of the mortgagee. The judgment, therefore, must be for the plaintiff.

BAYLEY, J.: I am of the same opinion. The argument proceeds on the ground, that the mortgagor was in possession by wrong; but as the special verdict does not find a wrongful possession, we ought not to presume it. The statute of limitations cannot attach, unless it is shown that the mortgagor held in opposition to the will of the mortgagee. It is clear the fine cannot operate to displace or divest the right of the mortgagee, and does not, therefore, require an entry to avoid it.

Holroyd and Best, Js., concurred.

Judgement affirmed.

GRAY v. GILLESPIE.

[59 N. H. 469—1879.]

Writ of entry on a mortgage. Plea, the general issue with a brief statement that the condition of the mortgage has not been broken. Motion to reject the brief statement.

Bingham, J.: It is provided by Gen. Laws, c. 232, s. 12, that in actions on mortgages the judgment shall be conditional, that if the mortgagor pays to the mortgagee the sum the Court shall adjudge due, within two months after judgment rendered, with interest, the judgment shall be void. The defendant claims that this provision applies to all actions upon mortgages, and that, if nothing is due on the mortgage debt, no action can be maintained because no judgment can be rendered. This statute, almost in its present form, has existed in this State for a longer period than is covered by our reported cases. We are unable to find an instance in which the Court has intimated such a construction as the defendant claims. A mortgage vests the seisin of the estate in the mortgagee, and he may at any time enter upon the mortgagor, and take and retain possession of the premises for the purpose of receiving the rents and profits until the condition is performed. *Brown v. Cram*, 1 N. H., 169; *Hartshorn v. Hubbard*, 2 N. H., 453; *Hunt v. Stiles*, 10 N. H., 466; *Dearborn v. Dearborn*, 9 N. H., 117; *Ellison v. Daniels*, 11 N. H., 274; *Smith v. Moore*, 11 N. H., 55, 61; *Chellis v. Stearns*, 22 N. H., 312. In an action brought to foreclose a mortgage, the judgment must be conditional. But in this case, the mortgagee, being entitled to the possession of the premises in order that he may take the rents and profits, can maintain his action. *Hobart v. Sanborn*, 13 N. H., 226.

Case discharged.

Allen, J., did not sit; the others concurred.

MASS. PUB. STAT. Ch. 181. § 10. Nothing contained in this chapter shall prevent a mortgagee or any person claiming under him from entering on the premises or from recovering possession thereof before breach of the condition of the mortgage, when there is no agreement to the contrary.

Vermont Stat., Sec. 1498: Every mortgagor shall, until condition broken, have, as against the mortgagee, the legal right of possession to the mortgaged premises, unless it is otherwise stipulated in the mortgage deed.

New York Code Civ. Proc., Action to Recover Real Property, Sec. 1498: A mortgagee, or his assignee or other representative, cannot maintain such an action, to recover the mortgaged premises.

HUBBELL v. MOULSON.
[53 *New York*, 225—1873.]

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendants, entered upon an order denying motion for a new trial and directing a judgment on verdict.

This action was ejectment to recover possession of the undivided half of a lot of land situate in Brighton, Monroe county. The facts appear sufficiently in the opinion.

The court directed a verdict in favor of defendants which was rendered accordingly. Exceptions were ordered heard in the first instance of General Term.

Francis Kernan for the appellant. Payment of the mortgage or tender of the amount due discharges the lien of a mortgagee. (3 R. S., 3d ed., 599, 850; 4 Kent's Com., 11th ed., 169; note 4; Edwards v. Farmers' Ins. Co., 21 Wend., 467; S. C. in error, 26 id., 541; Arnott v. Post, 6 Hill, 65; Kortright v. Cady, 21 N. Y., 343; Waring v. Smith, 2 Barb., Ch., 119, 135). After payment or tender of the amount due an action of ejectment will lie. (21 Wend., 467; 26 id., 541; 6 Hill, 65).

W. F. Cogswell for the respondents. Defendants were mortgagees in possession, and an action of ejectment could not be maintained against them. (Van Duyne v. Thayer, 14 Wend., 233; Phyfe v. Reiley, 15 id., 248; Chase v. Peck, 21 N. Y., 581; Hubbell *et al.* v. Sibley, MS.).

ANDREWS, J.: The plaintiffs claim title under Alfred Hubbell, the mortgagor, to the undivided half of premises mortgaged by him to Hiram Sibley, December 1, 1846, to secure the payment of \$7,000. The action is ejectment, and it was necessary for the plaintiffs, in order to recover under their complaint, to show that they were entitled, as against the defendants, to the possession of the premises at the time of the commencement of the action. The defendants are the grantees of Sibley, the mortgagee, under a deed

dated June 7, 1849, and are in possession, claiming under that deed. They stand, by reason of that conveyance, in privity with the mortgagee, and their right to the possession is the right of the mortgagee, and the right of the plaintiffs depends upon the same principles as if Sibley was in possession and the action had been brought against him. (*Jackson v. Mueller*, 10 J. R., 479; *Jackson v. Bowen*, 7 Cow., 13; *Robinson v. Ryan*, 25 N. Y., 320). The plaintiffs on the trial offered to prove that the mortgage debt had been paid by the receipt by Sibley, before the commencement of the action, or rents and profits from the land sufficient to satisfy it. The evidence was excluded. If the mortgage was in law subsisting and unsatisfied when the action was commenced, then it cannot be maintained, as the authorities are decisive that ejectment will not lie by a mortgagor against a mortgagee in possession. (*Van Duyne v. Thayre*, 14 Wend., 233; *Phyfe v. Reiley*, 15 Wend., 248; *Pell v. Ulmar*, 18 N. Y., 139). Leaving out of view the alleged title under the statute foreclosure, the question arises, whether the receipt by a mortgagee in possession of rents and profits, sufficient to satisfy the mortgage debt, does *ipso facto* extinguish it and discharge the lien of the mortgage. If it does not, then the evidence was properly excluded. If admitted, it would not have shown a right in the plaintiffs to the possession of the premises when the action was brought.

It is the settled doctrine in this State that a mortgagee has by virtue of his mortgage a lien only, and not an estate in the land mortgaged. (*Runyan v. Mersereau*, 11 J. R., 537; *Jackson v. Craft*, 18 id., 110; *Jackson v. Bronson*, 19 id., 325; *Kortright v. Cady*, 21 N. Y., 343; *Stoddard v. Hart*, 23 id., 560). In harmony with this view it was held in *Kortright v. Cady* that a tender of a mortgage debt after it became due discharged the lien of the mortgage and prevented a subsequent foreclosure. And it was held in *Edwards v. The Fireman's Fire Ins. and Loan Co.*, (21 Wend., 467; 26 id., 541), that upon a tender after default by a mortgagor of the mortgage debt, ejectment would lie in his favor upon the refusal of the mortgagee to surrender the possession. But while no title in a strict sense vests in the mortgagee of land until foreclosure, yet his interest is, in some cases, treated and regarded as a title, for the purpose of protecting and enforcing the equities between parties. An instance of this is found in *Mickles v. Townsend* (18 N. Y., 575) where it was so held for the purpose of applying to the doctrine of estoppel by deed against a person claiming as assignee of a mortgage, which existed at the time of his prior conveyance of the mortgaged premises with warranty, but which was assigned to him afterward. And in *Van Duyne v. Thayre* (19 Wend., 162) the release of the equity of redemption by the mortgagor to the mortgagee was held to inure as an enlargement of the estate of the mortgagee so as to prevent the plaintiff's recovering dower at law, in disregard of the equity of the defendant to have the mortgage first satisfied out of the land. (*Cowen, J.*, 21 Wend., 485).

It is easy to see that where the English doctrine prevails, that the mortgage conveys a legal title to the mortgaged premises, the

right of the mortgagor to an account of the rents and profits of the land received by the mortgagee is purely exclusively of equitable cognizance. At law, the mortgagee is the owner of the estate, and takes the rents and profits in that character. In equity, the mortgagor is regarded as the owner until foreclosure, and his right to an account is incident to his right of redemption. (2 Wash. on Real Property, 161, 205; Seaver v. Durant, 39 Vt., 103; Parson v. Welles, 17 Mass., 419). But the necessity to resort to an accounting in equity, in order to have the rents and profits applied to the satisfaction of the mortgage, is not obviated by the fact that here the mortgagor retains the legal title. The mortgagee in possession takes the rents and profits in the quasi character of trustee or bailiff of the mortgagor. (2 Pow. on Mort., 946, a; 2 Wash., 205). They are applied in equity as an equitable set-off to the amount due on the mortgage debt. (Ruckman v. Astor, 9 Paige, 517). The law does not apply them as received to the payment of the mortgage. It depends upon the result of an accounting upon equitable principles, whether any part of the rents and profits received shall be so applied. The mortgagee is entitled to have them applied, in the first instance, to reimburse him for taxes and necessary repairs made upon the premises; for sums paid by him upon prior incumbrances upon the estate, in order to protect the title, and for costs in defending it; and if he has made permanent improvements upon the land, in the belief that he was the absolute owner, the increased value by reason thereof may be allowed him. So he may be charged with rents and profits he might have received, if his failure to recover them is attributable to his fraud or willful default. (2 Powell on Mort., 957, note; 4 Kent, 185; 2 Wash., 218; Cameron v. Irwin, 5 Hill, 272; Mickles v. Dillaye, 17 N. Y., 80). In many cases complicated equities must be determined and adjusted before it can be ascertained what part, if any, of the rents and profits received is to be applied upon the mortgage debt. In the absence of the agreement between the parties there is no legal satisfaction of the mortgage by the receipt of rents and profits by a mortgagee in possession to an amount sufficient to satisfy it, and his character as mortgagee in possession is not divested until they are applied by the judgment of the court in satisfaction of the mortgage. These considerations lead to an affirmation of the judgment without considering the question of the validity of the statute foreclosure.

The plaintiff's claim to recover upon the allegation of a right to the possession of the premises when the action was commenced. The defendants were in possession, claiming under the mortgagee whose mortgage was outstanding and unsatisfied. The action is not for a redemption or of an accounting, and the plaintiffs are not in the attitude or resisting an attempt by the mortgagee to enforce the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

* Accord. Townshend v. Thomson, 139 N. Y., 152, (1893). But see Chase v. Peck, 21 N. Y. 581, 596; *super* p. 106.

NASH v. PRESTON.

(3 *Croke*, 190.—1631.)

A bill in chancery was referred to Jones, Justice, and myself, to consider whether one should be relieved against dower demanded, &c.

The case appeared to be that J. S., being seised in fee, by indenture enrolled, bargains and sells to the husband for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a peppercorn; and with a condition that if he paid the hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He re-demised it accordingly, and dies: his wife brings dower.

The question was, whether the plaintiff shall be relieved against this title of dower?

We conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower; for it is in him and out of him *quasi uno statu*, and by one and the same act. Yet in this case we conceived that by the law she is to have dower; for by the bargain and sale the land is vested in the husband, and thereby his wife is entitled to have dower; and when he re-demise it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act of rule in law, a court of equity shall not bar her to claim her dower, for it is against the rule of law, viz., "Where no fraud or covin is, a court of equity will not 'relieve.' " And upon conference with the other justices at Serjeants-Inn upon this question, who were of the same judgment, we certified our opinion to the court of chancery that the wife of the bargainee was to have dower, and that a court of equity ought not to preclude her thereof.

NOEL v. JEVON. 2 Freeman, 43, (1678). *In Curia Cancellariae.* The bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of Nash v. Preston, 1 Cro., 191, and so it was said is the constant practice of the court now.

TITUS v. NIELSON. 5 Johns, Ch. 452, (1821). The petition of Catherine Neilson was presented, claiming dower out of the proceeds of the sale of an equity of redemption, in certain mortgaged premises. The opinion of KENT, CH., was in part as follows:

The claim of the widow must be admitted, according to a series of decisions in the courts of this State. In England, dower is considered as a mere legal right and equity follows the law and will not create the right where it does not subsist at law. It is on this principle, according to Lord Redesdale (2 Sch. and Lef. 388), that a court of equity will not allow dower of an equity of redemption reserved upon a mortgage in fee, though there may be dower of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. The justice, however, of allowing dower of an equitable estate seems to have been very generally felt and acknowledged in the English courts of equity. But we have nothing to do at present with the English adjudications on the subject, for, as our courts of law do not allow dower in certain cases of an equity of redemption, this court, according to the doctrine referred to, ought to follow the law, and also allow dower out of the proceeds of the equity of redemption, and which proceeds have in this case been placed before the court.

The case of *Coles v. Coles* (15 Johns., Rep. 319), went a step still further, and held that, where a person seized of land in fee mortgages it, and afterwards marries, his widow was entitled to dower out of that equity of redemption, against the purchaser of that equity, though the mortgage was still subsisting. Here was a final and full establishment in our courts of law of the principle not admitted in the English courts of law, that a wife could be endowed of an equity of redemption arising upon a mortgage in fee, and this court ought to follow the rule of law. It ought to do so, according to the rule and practice of the courts of equity in England, in the like case, and because the doctrine recognizing the legal title of the mortgagor before foreclosure first originated in this court, and was confirmed in the Court of Appeals, and finally, because it is a most just and reasonable doctrine, and has been so acknowledged throughout the history of the cases.

CASHBORN v. INGLISH.

[7 *Vin. Abr.* 156.]

The resolution of the court by Lord Chancellor Hardwicke: The principal question in this case, on which I am now to give my opinion, is, whether the defendant English can be tenant by the courtesy of an equity of redemption. The mortgagee came into possession in 1731.

Thomas Cashborn, father of the plaintiff, and of the wife of the defendant English, by virtue of a marriage settlement, being seized of some lands in tail, and of other lands in fee simple, had issue three daughters. Part of the land, of which he was seized in fee, he settled on himself for life, with remainder to Anne, his eldest daughter, in fee, and the other part of such lands he devised by his will to the said Anne, his daughter, and her heirs, subject to the payment unto her two sisters of £200 apiece. Anne, after the death of her father, borrowed £900 of the defendant Scarf, and by lease and release of 24th and 25th of June, 1728, mortgages part of

the fee simple lands to the said Scarf and his heirs, under a proviso to be void on payment of £900 and interest. August 6th, 1729, the said Anne intermarried with the defendant English, and in 1731 died, leaving issue by him a son, who died without issue, and on his death his two aunts, the plaintiffs, became his heirs at law, and entitled to that inheritance, and, as such, brought their bill, Trin., 1733, in this court, against mortgagee defendant Scarf, and the defendant English, among other things, for a redemption of the mortgaged premises, and to have an account of the rents and profits of the real estate, which belonged to the plaintiff's wife, that descended to his son, from the time of the death of such son, as heir at law to both of them.

The defendant English insisted to be entitled to the mortgaged premises for his life, as tenant by the curtesy, and the cause, being at issue, was heard on the 8th of Hay, 1735, before His Honor the Master of the Rolls, when it was decreed that the defendant English was not entitled to be tenant by the courtesy of the mortgaged estates, and so was decreed to account for the rents and profits thereof from the death of his son.

From this decree the defendant English thought fit to appeal, and the general question now is, whether the husband can be tenant by the courtesy of the equity of redemption upon a mortgage in fee? This question depends on two considerations:

First. What kind of interest an equity of redemption is considered to be in the eye of this court?

Second. What is requisite to entitle the husband to be tenant by the courtesy?

First. What kind of interest in the eye of this court an equity of redemption is? An equity of redemption has always been considered in this court as an estate in the lands; it is such an interest in the land as will descend from ancestor to heir, and may be granted, entailed, devised or mortgaged, and that equitable interest may be barred by a common recovery. Which proves that an equity of redemption is not considered barely as a mere right, but such an estate whereof, in the consideration of this court, there may be a seisin, or a devise of it could not be good. The person who is entitled to the equity of redemption is in this court considered as owner of the land, and the mortgagee to retain the land as a pledge on deposit.

And for this reason it is that a mortgage in fee is considered as a personal estate, notwithstanding the legal estate vests in the heir in point of law.

The husband of a mortgagee in fee shall never be tenant by the courtesy of the mortgaged estate unless there be a foreclosure, or that such mortgage has subsisted for so great a length of time as the court thinks sufficient to induce them not to grant a redemption.

It is objected by the plaintiffs that an equity of redemption is only a right of action, and not to be considered as such an estate whereof there can be a tenancy by the courtesy, but this is by no means well founded: for this is no otherwise a right of action than every trust, and as there can be no benefit had of an equity of re-

demption but by suing a subpoena out of the court, so is the case of every mere trust in land, which is considered as a real estate in this court, but cannot be come at without a subpoena. To say that is a mere right of action is by consequence to say that the estate in the lands is in nobody, and this determines the question; for if a mortgage is but a chose in action, this affirms that the equity of redemption is the real ownership of the estate, and this will determine the point between them.

It is objected that the mortgagee is not barely a trustee for the mortgagor; it is true, not barely a trustee, but it is sufficient for the present purpose if he is in part a trustee for the mortgagor, and it is most certain that as to the real estate in the land, the mortgagee is only a trustee for the mortgagor till foreclosure. Mortgagee is only owner as a charge or incumbrance, and entitled to hold as a pledge, and as the inheritance descended, and real estate in the land, the mortgagee is a trustee for the mortgagor till the equity of redemption is foreclosed.

Secondly. The next consideration is what is requisite to entitle the husband to be tenant by the curtesy. At law four things are necessary to make a tenancy by the curtesy (to wit), marriage, having issue that may inherit; death of the wife, and seisin of the wife. (Co. Litt., 30 a.) Here it is admitted that the three first did concur, but the objection that is relied on is that there was no actual seisin of the wife during the coverture, which is contended to be as necessary in respect to an equitable estate as of a legal estate, and it is admitted that the wife had no actual seisin of the legal estate, either in fact or in law. Here is no dispute whether actual seisin in consideration of law, but all that is beside the present question; for the proceedings are upon a supposition, as no such thing as a tenant by the curtesy; but the true question is upon this point, whether there was not such a seisin or possession in the wife of the equitable estate in the land, as in consideration of equity is equivalent to an actual seisin of a legal estate at common law.

In consideration of this court, I am of opinion there was such a seisin of the wife in the present case of the equity of redemption.

I have shown that a person entitled to the equity of redemption is owner of the land of the legal estate; and, if so, there must be a seisin of the legal estate; and what other seisin could there be than what English and his wife had in the present case?

For here is a mortgage in 1728 by Ann Cashborn, who in 1729 married with the defendant English, and in 1731 died, leaving issue a son, and the wife was all along in possession till her death, and mortgagee did not come into possession till after her death, and there is not any foreclosure, and though the possession of the wife was but as tenant at will to the mortgagee, yet it was, in equity, a possession of the real owner of the land, subject only to a pecuniary charge on it, and from thence I think it clearly follows that there cannot be a higher seisin of an equitable estate.

Next, whether there can be tenant by the curtesy? I am of opinion there may be a tenant by the curtesy of the equitable estate of the wife; equity follows the law because made a rule of property.

WILLIAMS and WRAY, 2 Vern., 680 BALL's case cited, where it was determined that the husband be tenant by the curtesy of a trust estate of the wife, and so clearly there admitted, and yet the case was of a trust for the payment of debts.

SWEETAPPLE and BINDON, 2 Vern., 536, Mrs. Bindon gave money to be laid out in land to be settled on her daughter and her issue, and afterward the mother dies, and the daughter marries with Sweetapple, by whom she had issue, and dies before the money was laid out in lands, and upon the death of the wife Sweetapple brought his bill, praying that the money might be laid out in lands, and he might be decreed to hold the same for his life as tenant by curtesy, which my Lord Cowper decreed accordingly; which is a much stronger case than the present; for in that case there was neither seisin nor lands, but it was determined according to the common received rule of this court in considering money directed to be laid out in land, the same as land.

And as to the next objection of the wife's not being endowed of an equity of redemption on a mortgage in fee, and that therefore a husband ought not to be tenant by the curtesy of an equity of redemption, this proves too much; for it has been determined that a wife shall not be endowed of a trust estate, yet that husband shall be tenant by the curtesy of a trust estate. The argument from dower to the case of a tenant by the curtesy fails in this case. Perhaps it may be hard to find out a sufficient reason, how it came to be so determined in the one case and not in the other, but it is safe to follow former precedents, and what are settled and established, and if such precedents should be departed, I hold it fit rather that the wife should be allowed her dower of trust estate, and not that a tenancy by curtesy of a trust estate should be taken away.

It may be refusing to allow the wife dower of a trust estate was because she could not have it at law, and that it was founded on the maxim of *equitas sequitur legem*; but whatever the reason of such refusal was, the husband is allowed to have a tenancy by the curtesy of a trust estate, nay, even of money directed to be laid out in land, though not actually laid out, as in the case of Sweetapple before cited.

For these reasons, upon the best consideration (although I form my judgment with great deference, when I differ in opinion from other great persons that have gone before me), I am of opinion that the defendant English is entitled to be tenant by the curtesy of the mortgaged premises in question, and the consequence of that is that the part of the decree of His Honor the Master of Rolls, whereby it is adjudged that the said defendant is not tenant by the curtesy, must be reversed. (MS. Rep. Hill, Vac. II. Geo. 2.)

SARAH SNOW v. ABEL STEVENS.

[15 Mass. 266—1818.]

This was a writ of dower. The parties agreed to submit the action to the determination of the court, on the following statement of facts: "On the 4th day of February, 1809, one John L.

Tuttle, being seised in fee of 120 acres of land, of which the premises described in the defendant's writ are part, conveyed the same to Jonathan Snow, the then husband of the demandant, in fee, with general covenants of warranty against all incumbrances. The tenant holds by virtue of an execution against the husband of the demandant, duly levied upon the said premises. At the date of the said Tuttle's deed, a part of the estate conveyed by him, including the premises described in the demandant's writ, was encumbered by a mortgage deed, to secure the payment of a bond for 500 dollars to the Boston Bank made by one John Raymond, the said Tuttle's grantor, under which the said bank has never entered. The demandant was divorced from her said husband by this court in 1813, for the cause of adultery committed by him. On the 18th day of April, 1816, the said bank, in consideration of the amount due upon the bond and mortgage made by said Raymond, paid to them by one John Abbott, duly assigned said bond and mortgage to him; who then held another part of the mortgaged premises, under a title derived through mesne conveyances from said Johnathan Snow. Before December, 1815, the said Bank had transferred to said Abbott a bond, made by said Tuttle, conditioned to cause to be paid to them the money due upon the mortgage of said Raymond; and in December, 1815, the administrator of said Tuttle, who had deceased, paid to said Abbott the amount due on said Tuttle's bond made to said bank. On the 17th day of May, 1816, the Abbott duly assigned the mortgage made by Raymond to the bank, to Phineas Wright, the immediate grantor of the tenant. The demandant duly made a demand of her dower in the premises described in her writ, of the said tenant, on the 1th day of April, 1817. The said Jonathan Snow had duly conveyed, in 1810, all the estate he purchased of said Tuttle."

If upon these facts the demandant was by law entitled to her dower in the premises, described in her writ, the tenant agreed that dower should be assigned her in due form of law. But if she was not so entitled, she agreed that judgment be rendered for the tenant, for his costs.

PARKER C. J. The general position that a widow is not dowable of an equity of redemption, we think, is not true, in the extent contended for by the counsel for the tenant. No case has yet been decided upon that principle. In the cases cited (1), the doctrine goes no farther than that the widow of him, who was seised only of a right to redeem, should not have dower against the mortgagee. To this effect is the case of *Bird vs. Gardner*, which is principally relied upon; in which, although there are some general expressions, which go further than the case required; yet the decision was only that the claim of dower could not be maintained against the mortgagee and his assigns.

By the common law it may well be that a woman shall not be endowed of an equity; because it is an estate not known at law and existing only in equity. But then the interest of the widow in such estate is protected by the court of chancery.

In this commonwealth, an equity may be, to some purposes, considered a legal estate. It is so, in fact, against all but the mortgagee and those holding under him. For he that is seized of it may maintain his writ of entry, or his action of trespass, against any stranger; and he is generally in possession of the land when mortgaged until condition broken.

The tenant, in the case at bar, cannot be considered as now holding under the mortgage. He came in by purchase under the demandant's husband; and procured an assignment of the mortgage to strengthen his title. But the debt has been paid by the administrator of Tuttle, who conveyed to Jonathan Snow, the demandant's husband. The mortgage cannot be considered as subsisting, but as cancelled and extinguished; and the tenant holds under Snow, and not under the mortgagee; so that there is no legal reason why the demandant should be endowed.

Tenant defaulted.

VAN DYNE v. THAYRE.
[19 Wend., 162.—1838.]

The plaintiff claimed to recover dower in the premises in question, as the widow of Dennis Van Dyne, with whom she intermarried in 1824. On the 15th December, 1818, the premises in which dower was claimed were conveyed to her husband by one Morris Seely; her husband took possession and remained in until 1829, when he quit, leaving a person in possession as his tenant; her husband died in 1832. The defence set up was, that Van Dyne on taking his deed, executed a mortgage of the premises in question to one George D. Stewart, as part consideration of the purchase, conditioned for the payment of \$2,512 in instalments, the last instalment falling due in June, 1824; that the possession of the premises had been surrendered by the mortgagor in his lifetime to the heirs of George D. Stewart, and that the present defendant held under them. The question of fact principally controverted was in relation to a release of the equity of redemption alleged by the plaintiff to have been executed by her husband to the heirs of Stewart in consideration of a discharge from the mortgage debt; whereby she contended that the mortgage was extinguished, that the heirs of Stewart were in possession as purchasers and not under the mortgage, and that consequently she was dowable. On the other hand, it was strenuously insisted by the heirs of Stewart that such release had not been executed. The court, as will be seen in the opinion pronounced in this case, assume that such release was executed by the husband of the plaintiff. The judge charged the jury that it was immaterial whether the heirs of Stewart entered under a deed or not, if they entered claiming under the subsisting lien of the mortgage; and instructed them that if they were satisfied that the alleged mortgage had been executed by Van Dyne, that the same had become forfeited, and that the defendant was in possession under Stewart's heirs, and that the defendant was entitled to a ver-

dict. The plaintiff excepted to the charge. The jury found for the defendant, and the plaintiff now moved for a new trial on a case made.

By the Court, COWEN, J.:

The remaining question respects the charge of the judge; that though Stewart's heirs may have entered under a deed, yet if they also claimed under the mortgage, they are protected against this claim of dower in the husband's equity of redemption. If a deed or lease of the husband's equity or redemption to the mortgagee or his heirs, have the effect to destroy all claim under the former and paramount fee arising upon the conveyance by mortgage, there can be no doubt that such mortgagee or his heirs would be estopped, like any other grantee of the husband, to deny the widow's right of dower. It is equally clear, on the other hand, that where one comes in either as mortgagee, or under a foreclosure, he can hold against the widow; in the former case qualifiedly, in the latter absolutely. *Van Dyne v. Thayre*, 14 Wendell, 233. The case presented by this defence is that of a deed and an entry under it, accompanied with the declaration of an intention still to cling to the mortgage as a protection against liens, which might by priority of time overreach the deed. The power and right to accept a deed and enter thus qualifiedly would be perfectly clear in equity. *James v. Morey*, 2 Cowen, 246, 285, 287, 300, 303, 4, and the cases there cited, with several cases which will hereafter be noticed. See also *Freeman v. Paul*, 3 Greenl. 260. But we are sitting in a court of law, and are put to inquire how far we can sanction the defence in this place.

That the widow is dowable of an equity of redemption is agreed perhaps in all the States of the Union. 4 Kent's Comm. 44, 3d ed., and the cases and statutes there cited. *Walker v. Griswold*, 6 Pick. 416. When that is to be treated strictly as an equitable estate, her proper remedy is in a court of chancery. See 4 Kent's Comm. 44, 3rd ed., and the cases there cited. But she also has a remedy at law in all those cases where this estate can be properly considered as legal. When it is so, and to what extent, and under what restrictions the legal remedy is applicable, it becomes proper to inquire.

There can be no doubt that a conveyance in any form, of the husband's equity of redemption, though it arose upon a mortgage given by him before coverture, would be altogether ineffectual as a bar of dower, when set up by his mere assignee against his widow. As between the widow and assignee, the equity of redemption would be looked upon as a legal estate. Being disconnected with the title of the mortgagee, he shall never, in answer to a claim of dower, be allowed to set up the mortgage as an outstanding title. As a defendant claiming under her husband by a conveyance subsequent to the coverture, he stands absolutely estopped to deny the paramount right of the widow. In short, the mortgage is, for all purposes of defence, to him a non-entty. *Harrison v. Eldridge*, 2 Halst. 392. *Snow v. Stevens*, 15 Mass. R. 278. *Barker v. Parker*, 17 id. 564. All this was held, too, in *Hitchcock v. Harrington*, 6

Johns., R. 290, and *Collins v. Torry*, 7 id. 278, and to all this there can obviously be no objection. Both those cases and all the cases at law agree, however, in the qualification, that as against the mortgagee, the husband is not so seised that his widow can claim dower; and they introduce, I think, even a farther qualification, that if the mortgagee shall have entered for condition broken or foreclosed, the seisin is destroyed, and the husband's assignee could then defend himself on the ground of an outstanding title. Chancellor Kent says (4 Kent's Comm. 45, 3rd ed.), "As against the title under the mortgage the widow has no right of dower, and the equity of redemption is entirely subordinate to that title." Accordingly when this cause was here before, the deed from Van Dyne to Stewart's heirs being out of the question, the court, after holding that Van Dyne's admissions, though made during coverture, were receivable against his widow as a secondary evidence of the mortgage, put the defence on the simple and consistent ground that the mortgagee's heirs, having entered under the mortgage and the defendant claiming under them, his title was clearly the better one. Indeed, all seisin in the mortgagor was thus utterly subverted. Under these directions the cause went down to a second trial.

On a second trial, which is now under review, after the mortgage was shown, and that it was forfeited, and that the heirs of the mortgagee had entered, the plaintiff sought to defeat the effect of this evidence by proving in reply that not only was there a mortgage unsatisfied to a large amount, but that her husband had besides given to Stewart or his heirs an absolute deed in fee to satisfy the debt under a mutual arrangement between the parties, and that the heirs entered under that deed. To an unsophisticated mind such an answer would seem to be a most extraordinary one; yet these very heirs seem, from the beginning to the end of this cause, to have shrunk from the deed as an instrument of destruction. It was kept entirely out of view on the first trial; and now, after the second, they make a point that there was no deed in evidence; and that the plaintiff insists, with apparent triumph, that by the operation of this deed she stands an unincumbered claimant of that dower which she could have taken only in a qualified way had the mortgage been left to stand alone. All this, too, is claimed as the result of *Hitchcock v. Harrington* and *Collins v. Torry*, or more particularly of the latter case when taken in connection with the general doctrine of merger as established in *James v. Johnson*, 6 Johns. Ch. Rd. 423, and recognized in the S. C. by the title of *James v. Morey*, 2 Cowen, 246. It seems to me here has been some misapprehension, at least, of the decided scope of the authorities. With regard to the latter case and its kindred class of decisions, they merely hold that at law and generally in equity the union of a legal and equitable estate in the same person (like that of an estate of the mortgagor and mortgagee in this instance), extinguishes, or, as the phrase is, merges the equitable in the legal estate. 4 Kent's Comm., 101, 2, 3d ed. and the cases there cited. In other words, as I understand it, the legal estate becomes absolute. This notion was applied exactly in that way by Mr. Justice Story,

in *Dexter v. Harris*, 2 Mason, 531, 539. "At law," he says, "by the mortgage a conditional estate in fee simple passed to the mortgagee; and the only operation of the conveyance of Aldrich (of the mortgagor's title to the mortgagee) would be to extinguish the equity of redemption, and thus remove the condition. If that conveyance was good, it had the effect not to enlarge the estate, but to extinguish a right. It was not the drowning of a lesser in a greater estate, for the estate was already a fee simple; but it was an extinguishment of a condition or equity." The same was held in *Carll v. Buttman*, 7 Greenl., 192. Such an effect, I should apprehend, would do very little inquiry to *Stewart's* mortgage here. It does not necessarily even extinguish the debt. (*Spencer v. Hartford's ex'rs*, 4 Wendell, 381.) The upshot is that the mortgagor released all his right in the equity of redemption, and the heirs enter under an absolute instead of a qualified title. The dispute is about words. All this is called a merger; of what? of the legal estate? Who ever heard of a legal estate being merged in an equitable? The legal estate is always too strong for that. No one will say that both estates are merged. It would be still more extraordinary that one holding in himself all legal and all equitable right should be upset by the very perfection of his title; and yet it is said that was held in *Collins v. Torry*. In that case the demandant's husband conveyed the equity of redemption to Parsons, who conveyed to Winston, who conveyed to the defendant with warranty. Winston's administratrix purchased and took an assignment of the mortgage; and the courts do say that such an union worked an extinguishment of the mortgage. Had Winston himself, who held the fee, taken the assignment, it would certain, within all the cases, have extinguished the equity of redemption and carried the title to him. In that sense the mortgage would have been extinguished, as the court say, because the fee would have become absolute. That very point was held in *Gibson v. Crehore*, 3 Pick., 475; 5 Id. 146, S. C. and S. P. There, under an order of court, the husband's administrators conveyed his equity of redemption to the defendant, who purchased and took an assignment from the mortgagee, and then the widow came for her dower absolutely, as in *Collins v. Torry*. All our cases of dower and merger were cited in her support. The court repudiated her claim at law. Parker, Ch. J., said, in 3 Pick., 480, 481, if she were right in her claim the defendant would be a great sufferer, and the widow would gain an unjust advantage. He adds: "Several cases have been cited to show that widows are entitled to dower in the equity of redemption of mortgaged estates; and without doubt they are against all but the mortgagee and those claiming under him, and they may enforce their claims at law. So, also, if the mortgage is discharged by the husband in his lifetime, or by his executors or administrators out of the proceeds of his estate, the right of the widow, which had been suspended, revives, and she may proceed to recover her dower, just as if there had been no mortgage. But against the mortgagee or his assignee, her right is only in equity, and it is only by a bill in equity, and by paying her due proportion of the debt that she can avail herself of the

right," &c. The Chief Justice mentions a still stronger and more decisive case from 8 Mass., R. 491, *Sopkin v. Bumstead*, which I will state in his words: "The assignee of the mortgagor paid the debt to the mortgagee, and the latter entered a discharge of the mortgage on record; but the widow was held not entitled at law to her dower, because it would be to defeat the very purpose of the payment by the assignee, which was to give assurance to his own title." In *Coates v. Cheever*, 1 Cowen, 475, the case of *Collins v. Torry* is recognized as holding that a purchase of the equity of redemption and entry into possession, followed by an assignment from the mortgagee to the purchaser, shall extinguish the mortgage and entitle the widow to dower: and the court followed the doctrine to that extent without going back to look at the nature of the extinguishment. The case there adjudged is not like the one now before us, but it certainly shows *Collins v. Torry* as well as itself to be in conflict with the cases decided by the Supreme Court of Massachusetts, which appear to me to contain the true doctrine. The more *Collins v. Torry*, on which *Coates v. Cheever* was founded, shall be considered, the more, I venture to say, it will be found to have been without full consideration. I truth, there is no merger or extinguishment presented by that case, in any sense of the term. The legal and equitable estates never were united in the same person unless we should hold that land descends to the personal representative. Winston, an assignee of the husband, having conveyed the equity of redemption with warranty to the defendant, died, and his administratrix, not his heir, purchased and took an assignment from the executors of Fonda, the mortgagee. I admit this was probably done to save her husband's estate from liability on the warranty to the defendant. It is strange that an act thus done in good faith and with intention to save the estate should have been made the ground of a recovery against her deceased husband's grantee. If there be anything in the cases when they say that the equitable sinks into the legal estate, and the latter thereby becomes strengthened or becomes absolute, then all the cases which have ever been adjudged concur in principle to one end: they all concede that, as against the mortgagee or his assignee, or any one claiming under him, there can be no dower in an equity of redemption. (4 Kent's Comm., 45, 3d ed. and the cases there cited.) What is the estate of the husband at law as against the mortgagee, even while in actual possession under this equity of redemption? At most he is a tenant at will, and after he shall have parted with all that right by assigning his equity to the very mortgagee, it sounds most extravagant to say that such an act shall add to his estate. Such is the consequence, if we allow the plaintiff's argument; for the widow claims out of that estate. If the husband had done his worst the heirs of Stewart, by entering as mortgagees, could hold in despite of the plaintiff. By doing better, conveying all his interest and turning the mortgage to the heirs into an absolute fee, it is insisted that the fee thus created runs back into himself and creates a seizin whereof his widow is dowable. To my mind this is a new mode of conveyance, where a man in doing all he can to con-

vey his estate becomes himself the grantee. I am sure that in parity of reasoning his heirs might have ejectment; but there is no pretense for such a consequence. If it does not add to, it certainly does not diminish the estate of the heirs. (*Stoppelbien v. Shulte*, 1 Hill's Cas. on Ap., 200.) But the principles, so well supported by reason and authority, have been directly applied by this court to a case which cannot be extinguished from the case at bar. In *Jackson, ex dem. Bruyn, v. Dewitt*, 6 Cowen, 316, it was held that the husband may release the equity of redemption to the mortgagee or his assignee, and thus extinguish the wife's dower. This court held, in the spirit of all the cases, that, so far from reacting for the benefit of the widow, such a release to the assignee of the mortgagee who held the legal estate, did, to be sure, extinguish the mortgage, but it made the legal estate absolute. It is true the case is slightly distinguishable in its details. The husband had purchased and given back the mortgage to secure the purchase money before coverture, and the court say, on the authority of *Stow v. Tift*, 15 Johns. R. 458, that he was seized but for an instant. The simple amount of the case is, however, precisely like all others which are raised against the mortgage. The husband was disseised. How? By a conveyance of the legal estate to the mortgagee. What possible difference whether he was seized and disseised the same day, or seized one day and disseised ten years after, if both seizin and disseisin were before coverture? None at all, and so it was held in *Bird v. Gardner*, 10 Mass., R. 364. I repeat again, on all the authorities, that, as against the mortgagee, there is no seizin. Entry or foreclosure is a bar, and the two cases last cited hold that a release of the equity of redemption by the husband is equivalent to a foreclosure. Strange he should not be allowed to do this voluntarily, what a court of chancery would decree. My deduction from this and other cases, I state in the words of Chancellor Kent, 4 Comm. 45, 3d ed.: "The wife's dower in an equity of redemption only applies in case of redemption of the incumbrance by the husband or his representatives; and not when the equity of redemption is released to the mortgagee or conveyed." And see *Bolton v. Ballard*, 13 Mass., R. 227, and *Reed v. Morrison*, 12 Serg & Rawle, 18. Remember, we are speaking in a court of law, to which we professed in the outset to limit our inquiries. If there be a remedy for dower against the mortgagee in any case, or those claiming under him, it is extremely proper that the widow should be confined in a court of equity; and that distinction has recently been held in the case of *Smith v. Eustis*, 7 Greenl. 41, 43, upon a consideration of many authorities; again in *Carll v. Buttman*, Id., 102. And in *Gibson v. Crehore*, the plaintiff failing at law, 3 Pick. 475, was afterward relieved in equity, 5 Id. 146. That a case of this kind may often be open to very complicated equities and altogether unfit for a court of law, is plain enough on the least reflection; and it is strikingly illustrated by the last cited case. (See also *Eaton v. Simonds*, 14 Pick. 98.)

It follows that in any view the charge of the circuit judge was altogether unobjectionable on the part of the plaintiff. I enter-

tain no doubt that he would have been right in putting the matter to the jury without regard to the entry being under the mortgage. The case is all which it was when here before. Mr. Justice Nelson then said: "I have no doubt it was competent for the heirs to set up their possession as representing the legal estate in the mortgaged premises." I add, such a right in the heirs is made stronger—it is not necessary to say precisely how much stronger—by the deed which the plaintiff now insists upon.

*A new trial must be denied.**

(d) *Waste and Repair.*

KING v. SMITH.
[2 Hare, 239.—1843.]

W. Smith conveyed and surrendered certain freehold and copyhold estates to the use of J. Reid and his heirs, by way of mortgage, to secure £2,700, and interest. W. Smith, by his will, gave all his real and personal estate to the defendant, S. Smith (who was also his heir-at-law, customary heir, and sole executor), "in hopes that he might be able to pay his (the testator's) just debts, and find a surplus for his trouble." J. Reid devised his legal interest in the mortgaged premises to the plaintiffs, and appointed them his executors. The plaintiffs, by their bill, charged that the mortgaged premises were a "scanty security" for the principal and interest due, and that the plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency; and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgage debt—a sale accordingly—and payment out of the proceeds; and, if the same were insufficient, that the plaintiffs might be declared to be specialty creditors upon the estate for the deficiency; that, if necessary, the suit might be taken as being on behalf of the plaintiffs, and all other the unsatisfied creditors of W. Smith, and the personal and real estate duly administered and applied.

After appearance, and before answer, the plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees, which were growing on the mortgaged premises; that many of such trees were lying upon the lands, and had been advertised for sale; and praying an account of the trees felled, and of the monies produced by the sale, and an injunction to restrain the felling and sale of trees from the mortgaged premises.

The plaintiffs moved for the injunction, according to the prayer. VICE CHANCELLOR WIGRAM:

The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the Court will not grant an injunction merely because the

* Accord. *Everson v. McMullen*, 113 N. Y., 293, 1889.

mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this Court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1,000, and the property to be worth £1,000; that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would, probably, require more. It is rather a question of prudence than of actual value. I think the question which must be tried is whether the property the mortgagee takes as a security is sufficient in this sense—that the security is worth so much more than the money advanced—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the Court should permit the mortgagor to cut the timber. The supplemental bill which states the circumstances with respect to the timber, and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, take any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shown, I am not told the quantity of the land or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the defendant's affidavits, that he did not cut any of the trees with the intention of injuring the estate, but, on the contrary, he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious that the defendant is using language of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

Let the motion stand over, with liberty to apply. If the defendant proceeds to cut more timber the plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.

CAMPBELL V. MACOMB.—[4 *Johns. Ch.*, 534.—1820.]

THE CHANCELLOR (KENT). I cannot make it a condition of the order, staying the sale, that the defendant should repair

the dam. This would be a very extraordinary and dangerous interference with the exercise of the rights of a mortgagor, and is, in practice, unknown. Suppose, the most valuable part of the mortgaged premises should consist of buildings, and they should accidentally be destroyed by fire, can the mortgagor be compelled immediately to rebuild? Is it not rather incumbent on the mortgagee, or the surety, to provide for such a case in the contract, or by insurance? It would bring distress and ruin upon a mortgagor, to charge him with burdens and duties, not within the contemplation of his contract, and, therefore, not within his provident foresight. How far the court could, or ought to interfere, in a case of negligent, or permissive waste, rapidly impairing the security, is a question which need not now be discussed; for the relief, if any, would not be by directing the mortgaged premises to be sold for a debt not due, or, under a decree of sale, to give an order to repair, a reference to assess damages. The necessity of any interference, of any kind, in cases of mortgages, is exceedingly diminished by the consideration, that the mortgagee can, if he pleases, relieve himself, by obtaining possession of the land, and make, at his own expense, the requisite repairs, for which he would be allowed, in account, when the mortgagor came to redeem. It is also stated, in this case, that the present owner of the equity of redemption is in the act of repairing the dam; and it is so evidently his interest to do it, and his payment of the interest due on the mortgage, together with the costs, is such decisive evidence, that the property is considered to be worth more than the debt charged thereon, that I should infer there was little or no foundation for the alarm discovered in the petition.

Motion denied, with costs.

COOPER v. DAVIS.

[15 Conn., 556.—1843.]

WAITE, J. The defendant claimed title to the millstones in question, by virtue of a mortgage made to him of certain real estate, upon which was situated a grist-mill. He had obtained against the mortgagors a decree for a foreclosure, and a judgment for the possession, in an action of ejectment. But before the expiration of the time limited for the foreclosure, and before he had taken actual possession, the mortgagors severed the stones from the mill, and sold them to the plaintiff. The defendant, having afterwards found them, took possession of them as his own property.

The question arising upon these facts was, whether the plaintiff had thus acquired, as against the defendant, a valid title. Upon the trial in the court below, it was supposed that, after a decree for a foreclosure had been passed, and a judgment rendered in an action of ejectment for the possession, the mortgagors might be considered as trespassers, in removing the fixed machinery, and disposing of it, in the manner stated in the motion.

The law, recognized in the case of Hodgson v. Gascoigne, was thought to be applicable to the present. 5 B. & Ald. 81. 7 E. C.

L. 35. It was there holden, that after a landlord had recovered judgment against his tenant, in an action of ejectment for the possession of the demised property, the tenant ceased to have any interest in the growing crops, and the sheriff had no right to levy an execution upon them.

But, upon consideration, we are all satisfied that the principle, laid down in that case, does not apply to the present. There, the question was, as to the relative rights of a landlord and tenant; here, as to the rights of a mortgagor and mortgagee.

By repeated decisions, it is now fully established, that a mortgagor, before his right of redemption is foreclosed, continues the owner of the real estate mortgaged; that he is not accountable for the rents and profits, nor liable, in action at law, for waste committed while in possession. The mortgagee has merely a lien upon the property for the security of his debt, by virtue of which he may obtain possession, and appropriate the pledge in payment of his debt.

The mortgagor has, indeed, no right, by the commission of waste, to render the security inadequate. But the appropriate remedy for such conflict is, by way of injunction. If the security is impaired, by cutting and carrying away the wood and timber, the mortgagee has no power to seize them, after they have been severed and carried away; but his duty, in such case, is, to restrain the mortgagor from such acts by an injunction.

These general principles are not denied. But it is claimed that the rights of the defendant have been varied by the judgment in his favor for the possession. But we do not see that circumstances can make any material difference. He had not taken actual possession; nor had his title to the property become absolute by the decree. He stood, simply, in the character of mortgagee out of possession. His further proceedings in relation to the mortgage, might, at any time, have been arrested, by paying him his debt. His interest in the property continued to be but a lien. The mortgagors continued in possession, and, as such, were the owners. The mill-stones, after they had been severed from the mill, removed and sold, could not be reclaimed, by the defendant, by virtue of his mortgage. And although the design of the mortgagors probably was to impair the defendant's security, and prevent him from collecting the full amount of his debt, yet we cannot say that he is entitled to relief in the manner in which he has sought it. His duty was to have protected his rights, by an application for an injunction.

Upon this ground, therefore, without adverting to the other questions, which we do not consider it necessary to examine, we think a new trial must be granted.

In this opinion the other Judges concurred.

New trial to be granted.

PETERSON V. CLARK.—[15 *John.*, 205.—1818.]

PER CURIAM. There can be no doubt but that the deed from Van Camp to Clark, and defeasance given back, amounted only to a mortgage, and the simple question then is, whether a mort-

gagee can maintain an action of waste against the mortgagor, before the forfeiture of the mortgage; for the waste alleged to have been committed in this case, was before the expiration of the time limited for the payment of the money secured by the mortgage. Indeed, the present suit was commenced before that time. Waste is an injury done to the inheritance, and the action of waste is given to him who has the inheritance in expectancy, in remainder, or reversion; but it is expressly laid down by Blackstone (3 Bl. Com. 225), that he who hath the remainder for life only, is not entitled to sue for the waste, since his interest may never, perhaps, come into possession, and then he has suffered no injury. So, likewise, with respect to the mortgagee, especially when the mortgage is not forfeited, his interest in the land is contingent, and may be defeated by payment of the money secured by the mortgage; and it must follow, as a matter of course, that he has not such interest in the timber as to sustain an action of trover. The judgment of the court below must be reversed.

STOWELL v. PIKE
[2 Greenleaf, 287.—1823.]

In an action of trespass *quare clausum fregit*, the case was thus: The plaintiff, by his deed dated September 15, 1819, bargained and sold the close described in the writ to one Bickford, in fee, taking from Bickford, at the same time, a mortgage of the same land, to secure the payment of the purchase money, for which Bickford also gave his notes of hand to the plaintiff, amounting to three hundred and thirty dollars, payable at different periods in the course of the two years and a half, with interest. In the course of the Spring following, Bickford paid his first instalment; and in December, 1820, he sold all the timber then standing on the premises, to the value of two hundred and thirty dollars, to the defendant, Pike, and others, who, with the other defendants in their employment, without license from the plaintiff, cut it down and converted it to their own use, for which cutting this action was brought. Bickford continued in possession of the premises from the date of his deed till after the cutting of the timber, when the plaintiff entered upon him for condition broken, the residue of the purchase money being still due.

Upon these facts, the parties submitted the cause to the decision of the court, the defendants waiving any objection to the form of action.

MELLEN, C. J., delivered the opinion of the court, as follows:

If A. mortgage lands to B. in fee, the legal estate is considered to be in B. as between him and A. and those claiming under A., but as to all the world but B., A. is considered as seised of the legal estate, and so may convey to C., subject, however, to the mortgage. *Blaney v. Bearce* (2 Greenleaf, 132). For this reason, B. may maintain trespass against A. and those claiming under him, because A.'s possession is in submission to B.'s title, and is, in fact, the possession of B. In *Newall v. Wright*, 3 Mass. 138, Parsons, C. J., delivering

the opinion of the court, says: "It is very clear that, when a man, seised of lands in fee, shall mortgage them, if there be no agreement that the mortgagor shall retain possession, the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quite the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him, or he may, in a writ of entry, recover against him as a disseisor." There is nothing, then, in the relation between mortgagor and mortgagee, inconsistent with the nature of an action of trespass by the latter against the former; and surely a mortgagor, or one claiming under him, is not less liable for an injury to the mortgagee by cutting him down and carrying away timber and wood from the premises, than he would be by merely withholding the possession, and receiving the rents and profits to his own use. *Union Bank v. Emerson*, 15 Mass. 159. Bro. Tr. 55, 362. 5 Rep. 13. Cro. Eliz. 784. We need not, however, rely on these cases, or decide on the form of action, as the parties have waived all objections to form, if any exist. But on these principles we decided the case of *Smith v. Goodwin*, cited for the plaintiff, and, on the same principles, we think the action maintainable, unless the alleged usage and general understanding with respect to felling trees and clearing wild lands, though mortgaged to secure payment of the purchase money, should be considered as preventing the application of those principles to a case like the present. It was urged, by the defendant's counsel, that such usage and general tacit understanding are equal to a license from the mortgagee to the mortgagor or his assignee, to do the acts which are charged in this action as a trespass. The facts in the case do not present this question. We have no means of knowing whether any such usage and general understanding exist. The argument of the counsel, therefore, cannot avail, as it does not apply. If such usage and understanding existed at the time of the transactions of which we have been speaking, and were considered as amounting to a license, and pleadable as such against the deed in question, they should have been disclosed in the form of a special plea, and the question arising thereon left to the decision of the jury. As the case stands, the plaintiff must have judgment for the value of the timber and costs, according to the agreement of the parties.

SEARLE, *Exec.* v. SAWYER.
[127 Mass., 491.—1879.]

MORTON, J. This is an action of tort for the conversion of a quantity of wood and timber.

It appeared at the trial that one Warren, being the owner of a lot of wood-land, mortgaged it to the plaintiff's testator; and that, after the condition of the mortgage was broken, but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant. The presiding justice of the Supreme Court ruled that, "If the defendant bought of the mortgagor wood and timber cut from the mortgaged prem-

ises, and exercised such acts of ownership over the same as would amount to a conversion then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion. *Peterson v. Clark*, 15 Johns. 205. *Cooper v. Davis*, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. *Gore v. Jenness*, 19 Maine, 53. *Frothingham v. McKusick*, 24 Maine, 403. *Smith v. Moore*, 11 N. H., 55. *Langdon v. Paul*, 22 Vt., 205. *Waterman v. Matteson*, 4 R. I., 539.

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the conclusion that a mortgagee out of possession is entitled to timber, fixtures and other parts of the realty wrongfully severed, and may recover them, or their value, if a conversion is proved. In *Fay v. Brewer*, 3 Pick., 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court in the opinion comment on the case of *Peterson v. Clark*, 15 Johns., 205, as not being of authority here, "since the law of mortgage in New York is so different from our own." In *Page v. Robinson*, 10 Cush., 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber-trees from the mortgaged premises, without license express or implied from the mortgagee. In *Cole v. Stewart*, 11 Cush., 181, it was held an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land. In *Butler v. Page*, 7 Met., 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged

premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representative.

In *Wilmarth v. Bancroft*, 10 Allen, 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved, and brought this action to recover the price agreed to be paid. It was held that the fact that the mortgagee had claimed the agreed price, and forbidden the defendant to pay it to the mortgagor, was a good defence. The opinion is put upon the ground that the partial burning of the house, and the consequent severance of the unburnt materials, "did not terminate or affect the mortgagee's interest in the fixtures." So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security. *Gooding v. Shea*, 103 Mass., 360. *Byron v. Chapin*, 113 Mass., 308. *King v. Bangs*, 120 Mass., 514.

The fair result of these authorities is that, under our law, a mortgagee is so far the owner in fee of the mortgaged estate that, if any part of it is wrongfully severed and converted into personally by the mortgagor, his interest is not divested, but he remains the owner of the personally, and may follow it and recover it or its value of any one who has converted it to his own use. *Stanley v. Gaylord*, 1 Cush., 536. *Riley v. Boston Water Power Co.*, 11 Cush. 11. But the severance must be wrongful, and, where it is made by the mortgagor or one acting under his authority, whether it is wrongful or not will depend upon the question whether a license to do the act has been expressly given, or is fairly to be implied from the relations of the parties. The true rule is as stated in *Smith v. Moore*, 11 N. H. 55, and approved in *Page v. Robinson*, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber, or otherwise severing parts of the realty, are not wrongful when from the circumstances of the case the assent of the mortgagee may be reasonably presumed. The relation between a mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this state the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object of this is that mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used, and as will not unreasonably impair the adequacy of the security. If a mortgage be of a dwelling-house, the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case, it is clear that he is entitled to take the annual crops, and wood for fuel. *Woodward v.*

Pickett, 8 Gray, 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If, in carrying on similar farms, it is usual and good husbandry to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case, that we are unable to say how far these considerations are applicable in the case at bar. But the ruling of the presiding justice seems to have been general, that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury. We are of opinion that this question should be submitted to the jury, and, therefore, that a new trial must be ordered.

Exceptions sustained.

VAN PELT v. McGRAW.

[4 N. Y., 110.—1850.]

Van Pelt sued Southward and McGraw in the Court of Commons Pleas of Tompkins County and declared in case for wrongfully and fraudulently removing rails, timber, &c., from certain lands on which the plaintiff held a mortgage, thereby injuring his security, &c. It was proved on the trial, that in May, 1840, Almeron Baily and William E. Baily, being the owners of 119 acres of land in Dryden, Tompkins County, executed a bond and mortgage covering the same to Harvey A. Rice, to secure the payment of \$500, one-half payable in May, 1841, and one-half in May, 1842. In August, 1842, Rice sold and assigned the bond and mortgage to the plaintiff, who instituted a foreclosure suit thereon, and obtained the usual decree for the sale of the premises in August, 1844. The amount then due on the mortgage, including the costs of the foreclosure suit, was nearly nine hundred dollars. The mortgagors were insolvent, and the premises were an inadequate security for this sum. On the sale under the decree, which took place in October, 1844, the premises produced only the sum of \$575. Shortly before the sale, and while the advertisement was running, the defendant, McGraw, who had become the owner of the equity of redemption by conveyance from the mortgagors, avowing that he would "strip the land," proceeded to draw off rails, and to cut down and draw off valuable timber, &c. The premises were thereby considerably lessened in value. These acts were done by McGraw, and by Southworth aiding and assisting him, with full knowledge of the plaintiff's mortgage, and of the insolvency of the mortgagors.

The defendant's counsel requested the court to charge the jury that McGraw having the fee of the land, and being in possession, had a right to take off the fences and timber, and that these acts being lawful could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they

did not prejudice the plaintiffs' rights or impair his security, but if the defendants had impaired that security with a knowledge of the lien then their acts were wrongful and fraudulent. The defendants' counsel also requested the court to charge, that inasmuch as the plaintiff had alleged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove these allegations by other evidence than mere removal of the rails and timber for their own emolument. The court refused to so charge. To the charge as delivered and to the refusal to charge as requested, the defendants excepted. The jury found a verdict of \$150 in favor of the plaintiff. The judgment entered thereon was affirmed in the Supreme Court on error brought. The defendants appealed to this court.

PRATT, J. There is no doubt but that an action on the case will lie for an injury of the character complained of in this case. It forms no objection to this action that the circumstances of the case are novel, and that no case precisely similar in all respects has previously arisen. The action is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a right or duty growing out of the relations existing between the parties. (1 Cow. Treat. 3.)

The defendant McGraw, in this case, came into the possession of the land subject to the mortgage. The rights of the holder of the mortgage were therefore paramount to his rights, and any attempt on his part to impair the mortgage as a security, was a violation of the plaintiff's rights. But the case is not new in its circumstances. The case of *Gates v. Joice* (11 John. 136), was precisely like the case at bar in principle. That action was brought by the assignee of a judgment against a person for taking down and removing a building from the land upon the judgment was a lien. The plaintiff's security was thereby impaired. The court in that case sustained the action. The decision in that case was referred to and approved in *Lane v. Hitchcock* (14 John. 213), and in *Gardner v. Heartt* (3 Denio. 234). Nor is there anything in the case of *Peterson v. Clark* (15 John., 205), which conflicts with the principle of these cases. That was an action by a mortgagee in the usual form of an action for waste. The declaration alleged seisin in the plaintiff, upon which the defendant took issue. There was no allegation that the mortgagor was insolvent, or the judgment as a security impaired. The only issue to be passed upon was that in relation to the seisin. It is quite clear that upon such an issue the mortgagee must fail. Now this action is not based upon the assumption that the plaintiff's land has been injured, but that his mortgage as a security has been impaired. His damages, therefore, would be limited to the amount of injury to the mortgage, however great the injury to the land might be. It could, therefore, be of no consequence whether the injury occurred before or after forfeiture of the mortgage. The action is clearly maintainable.

It only remains, therefore, to be considered whether there was

any error in the charge of the court. In order to come to a correct conclusion upon this point, it becomes necessary to examine the exceptions to the charge in connection with the undisputed testimony in the cause, and the propositions upon which the court were required to charge. It had been proved that the defendants knew of the mortgage, that the mortgagors were insolvent, and that the property had been advertised for sale by virtue of the mortgage. They were forbid to remove the fences and timber, for the reason that the security would thereby be impaired. It was also proved that the value of the mortgage had been impaired by such removal. Under this state of facts the defendants' counsel asked the court to charge the jury, that McGraw having the fee of the land, and being in possession, had a right to take off the fences and timber; that the acts being lawful, could not be deemed to have been done wrongfully or fraudulently. The court charged that the acts were lawful if they did not prejudice the plaintiff's rights or impair his security, but that if they had impaired the security, knowing the plaintiff's lien, they were liable. As an answer to the propositions of the defendants' counsel, the charge was correct. Acts may be harmless in themselves, as long as they injure no one, but the consequences of acts often give character to the acts themselves. It is upon this distinction that the maximum is based, *sic utere tuo ut alienum non laedas*. As I have before observed, the lien of the plaintiff upon the land was paramount to any interest which the defendants possessed therein, and any wilful injury of that lien by them was a violation of the plaintiff's rights, for which an action would lie.

The defendants' counsel also asked the court to charge that the plaintiff having alleged in his declaration that the defendants did the acts fraudulently and with a design to injure the plaintiff, he was bound to prove the allegations by evidence other than the mere act of removing the timber for the emolument of the defendants. The court refused to so charge, to which there was an exception. This proposition is somewhat obscure, but I understand it to mean that the plaintiff should prove that the primary motive of the defendants was to cheat the plaintiff. If the defendants knew that by taking off the timber the value of the plaintiff's mortgage as a security would be impaired, they would be legally chargeable with a design to effect that object, although their leading motive may have been their own gain. A man must be deemed to design the necessary consequences of his acts. If, therefore, he does a wrongful act knowing that his neighbor will be thereby injured, he is liable. It is upon this principle that persons are often chargeable with the intent to defraud creditors, or to commit any other fraud. The immediate motive is oftentimes self-interest, but if the necessary consequence is a fraud upon his neighbor, the actor is legally chargeable with a design to effect that result. Upon the whole, therefore, although the charge is not quite so explicit as it should be, yet taken in connection with the propositions presented to the court, I think it was substantially correct. The judgment of the Supreme Court should be affirmed. *Judgment affirmed.*

Appeal from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term denying a motion for a new trial.

This action was brought for the foreclosure of a mortgage made by the defendant George Hubbard and wife. Plaintiff sought to recover of defendants, C. S. Maltby and Thorn J. Houston, in case the mortgaged premises should not realize, upon sale, sufficient to pay the mortgage debt, the value of certain wood cut upon the mortgaged premises, the complaint alleging fraud and collusion between them and the mortgagor.

Hubbard purchased the promises in question, being mostly woodland, of plaintiff's intestate, in 1867, subject to a mortgage thereon held by one Knapp, giving the mortgage in suit for part of the purchase money. In 1871, Hubbard entered into a contract with Maltby and Houston, by which he sold to them the wood growing on the mortgaged premises, the same to be cut by the purchaser, measured and paid for March 1, 1871. Plaintiff, learning that the wood was being cut, called upon Hubbard, and threatened to stay the cutting by injunction; but upon Hubbard agreeing to pay over the money received for the wood on the Knapp mortgage, he abandoned the intent. On the 27th of February, 1871, after the wood was all cut, plaintiff, being apprehensive that Hubbard would not do as he agreed, notified the purchasers of the wood of his lien, of the agreement with Hubbard, and communicated to them his fears, requesting them to delay paying over the purchase money; this they declined to do, but paid the same to Hubbard, as agreed, on the 1st of March. Up to the time of such notice they had no knowledge that there was any mortgage upon the premises, and the allegations of fraud were not proved. Hubbard did not pay it over, as agreed, but absconded therewith. The mortgaged premises were insufficient to pay the mortgages.

ANDREWS, J. The contract for the purchase of the wood was made by the defendants, Maltby and Houston, with Hubbard, the owner of the land from which it was taken. Hubbard was in possession of the premises, and, by the contract, the defendants were to cut the wood and to pay Hubbard a certain price per cord on the 1st of March, 1871. The defendants did not know until on or about the 24th of February, 1871, of the plaintiff's mortgage, or that there was any incumbrance on the land. The wood had been cut and nothing remained to be done by the defendants under the contract, except the payment of the purchase price. There can be no doubt that the title to the wood vested in the defendants upon its severance from the land. They were the owners of the wood by purchase from the owner of the land, and were debtors to Hubbard for the agreed price. The fact that the land was mortgaged when the contract was made, or when the wood was cut, did not affect the defendant's title to the severed property, and although the cutting of the wood impaired the security of the mortgage, the defendants

were not responsible to the mortgagees for the resulting injury, unless they cut the wood, knowing of the lien, and with intent to injure the plaintiff in respect to his security. (*Van Pelt v. McGraw*, 4 Comst., 110.) There is an additional reason in this case why the plaintiff is precluded from treating the act of the defendants, in cutting the wood, as tortious, and upon the promise of Hubbard that he would apply the money he should receive from the defendants upon the Knapp mortgage. The promise was made in December, and it was not until the following February that he notified the defendants of his claim on the premises, and at that time they had completed the work under the contract with Hubbard. This transaction operated as a license to Hubbard to sell the wood to the defendants, and estopped the plaintiff from questioning their title. The question then comes to this: Could the defendants lawfully pay their debt to Hubbard, against the protest of the plaintiff, after being informed that Hubbard threatened to violate his agreement to apply the money on the prior mortgage? There can be but one answer to this question: The defendant's contract was with Hubbard alone, and their debt was owing to him. The promise of Hubbard to apply the amount he should receive from the defendants on the Knapp mortgage did not make the plaintiff the assignee of the debt. It gave to the plaintiff at most a right as against Hubbard to intercept the payment upon proceedings taken, based upon evidence that he threatened to dispose of the money in violation of his agreement.

We express no opinion whether such an action could be maintained, but we think it is clear that until prevented by the order of the court, the defendants could lawfully pay the debt to Hubbard, and that if they had refused, he could have maintained an action to recover it.

The defendants were neither parties or privies to the agreement between Hubbard and the plaintiff, as to the application of the fund, and they owed no legal duty to the plaintiff to defer the payment of their debt at his request. That agreement recognized Hubbard's right to receive the payment, and no legal proceedings having been taken to prevent it, the payment to him was a valid discharge of their obligation.

In view of the finding of the jury, it cannot be claimed that collusion with Hubbard in the transaction, or misled the plaintiff, or induced him to institute legal proceedings against Hubbard, upon the promise to retain the money until an injunction should be procured.

The judgment should be affirmed.

Judgment affirmed.

WALMSLEY v. MILNE, 7 C. B. (N. S.) 115 (1859). Reported also 1 *Gray Cas. Prop.* 695.

CLIMIE v. WOOD, L. R. 4 Ex. 328 (1869). Reported also 1 *Gray Cas. Prop.* 706.

RICHARDSON v. COPELAND, 6 *Gray* 536 (1856). Reported also 1 *Gray Cas. Prop.* 731.

CLARY v. OWEN, 15 *Gray* 522 (1860). Reported also 1 *Gray Cas. Prop.* 746.

BRENNAN v. WHITAKER, 15 *Oh. St.* 446 (1864). Reported also 1 *Gray Cas. Prop.* 751.

DAVENPORT v. SHANTS, 43 *Vt.* 546 (1871). Reported also 1 *Gray Cas. Prop.* 762.

TIFT v. HORTON.
[53 N. Y., 377—1873.]

Appeal from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of the plaintiffs, entered upon the verdict of a jury.

This action was brought to recover damages for the alleged conversion of a boiler and engine.

The plaintiffs, under a written contract, manufactured the engine and boiler in question, with other machinery, for Mrs. Jane Coombs Brown, to be put up and used in a new elevator which Mrs. Brown was building, in the city of Buffalo. By the terms of the contract Mrs. Brown was to give, for a portion of the purchase price of the boiler, engine and other machinery, her two promissory notes, to be secured by a mortgage on the boiler and engine. The notes and mortgages were to be executed and delivered so soon as the engine and boiler were complete in the plaintiff's shop, ready to be put up at the elevator. The boiler and engine and other machinery were completed according to the contract; and, while in the plaintiff's shop, the mortgage was given as provided in the contract. It was provided in the mortgage that the engine and boiler should be and remain personal property until the notes mentioned in it were fully paid, notwithstanding the manner in which they should be placed in the elevator. The mortgage recited the fact that the engine and boiler were made to be put up in the elevator of Mrs. Brown, pursuant to the agreement above mentioned, and authorized the plaintiffs, in case of a breach of its condition, to enter the elevator and take and carry the boiler and engine away. Mrs. Brown failed to pay the second note secured by the mortgage. The boiler and engine were not put in the elevator building, but on a foundation made for them, outside of the building; and a building, called the engine-house, was built over them after they were set up. After the mortgagor failed to pay the note, plaintiffs went to take the boiler and engine, and, finding the defendants in possession, demanded them. The defendants claimed to own them, and refused to let the plaintiffs have them. The defendants claimed title to the engine and boiler through three real estate mortgages, executed by Mrs. Brown before the boiler and engine were set up on the premises. These mortgages had been foreclosed, and the premises sold under judgments obtained in the foreclosure actions, and

the premises bid off by and conveyed to the defendants. The rights of the parties, by stipulation before sale, were not to be affected by the sales on the judgments in the foreclosure actions. The defendants asked the court to decide, as a matter of law, that there was not any evidence of a conversion, by the defendants, of the boiler and engine. This the court declined to do. The defendants requested the court to decide that the boiler and engine were a part of the realty, as between the parties to this action, notwithstanding the written agreement. The court refused so to decide. The jury rendered a verdict in favor of the plaintiffs for the sum of \$5,141.88, and judgment was entered thereon.

FOLGER, J. It is well settled that chattels may be annexed to the real estate and still retain their character as personal property. (See *Voorhees v. McGinnis*, 48 N. Y., 278, and cases there cited.) Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one; and if the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this, is where the subject or mode of annexation is such, as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y., 344), as where the property could not be removed without practically destroying it, or where it, or part of it, is essential to the support of that to which it is attached. (Id.)

It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid; and by the same agreement, power was given to the plaintiffs to enter upon the premises in certain contingencies and to take and carry them away. While there is no doubt but that the intention of the owner of the land, was that the engine and boilers should ultimately become a part of the realty, and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiffs, that the act of annexing them to the freehold should not change or take away the character of them as chattels, until the price of them had been fully paid. And as parties may by their agreement expressing their intention to do so, preserve and continue the character of the chattels as personal property, there can be no doubt but that as between themselves the agreement in this case was fully sufficient to that end.

But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands; and that here the defendants, prior mortgagees of the real estate were interested, and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become subject

to the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose, before foreclosure sale, to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiffs, on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement, upon the covenants in his conveyance of the lands. (*Mott v. Palmer*, 1 N. Y., 564; and see *Ford v. Cobb*, *supra*.)

A prior mortgagee, who certainly has not been induced to enter his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage, personal property brought on to the premises with permission of the owner of the lands, and not at all affixed thereto. Nor can either claim personal property as so subject, from the mere fact of the affixing, where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to a right of removal by the owner of the chattel on failure of performance of conditions. The language of the authorities is that the chattel in such case is personal property, for which an action of trover for the conversion of it may be maintained. (*Smith v. Benson*, 1 Hill, 176; *Mott v. Palmer*, *supra*; *Farrar v. Chauffetete*, 5 Den., 527; *Ford v. Cobb*, *supra*.)

Another consideration makes it clear, I think, that in this case, the absence of a concurrent intention on the part of the prior mortgagees is of no weight. As above stated, as a general rule, all fixtures put upon lands by the owner thereof become a part thereof, and subject to the lien of a prior mortgage; but sometimes it is doubtful if they have been so annexed as to so become. And then, it is said, the question may be decided by the presumed intent of the party making the annexation of the chattels. (*Winslow v. Mer. Ins. Co.*, 4 Metc., 306.) The law makes a presumption in the case of any one making such annexation, and it is different as the interest of the person in the land is different, that is, whether it is temporary or permanent. The law presumes that because the interest of a tenant in the land is temporary, that he affixes for himself, with a view to his own enjoyment during his term, and not to enhance the value of the estate; hence, it permits annexations made by him to be detached during his term, if done without injury to the freehold, and in agreement with known usages. The law presumes that because the interest of the vendor of real estate, who is the owner of it, has been permanent, that he has made annexations, for himself, to be sure, but with a view to a lasting enjoyment of his estate, and for its continued enhancement in value. So the mortgagor of land is the owner of it, and has a permanent interest

therein, and the law presumes that improvements which he makes thereon, by the annexation of chattels, he makes for himself, for prolonged enjoyment, and to enhance permanently the value of his estate. (*Winslow v. Mer. Ins. Co.*, *supra*.) These are presumptions of the intention of the tenant alone, the vendor alone, and of the mortgagor alone; nor are they ordinarily concerned at all, with the relation to the lands, or with the purpose of the landlord, or the vendee, or the mortgagee; though there may be cases in which the intention of both parties may be of effect, as where a mortgagee has loaned money with the understanding that it shall be applied to enhance the value of the estate by the addition of chattels in such manner. And they are but presumptions, which in all cases may be entirely done away with by the facts. (*Lancaster v. Eve*, 5 C. B. —N. S.—*717.) So in *Elliott v. Bishop* (10 Exch., 496; s. c. in error, 11 Exch., 113), it is recognized that the express agreement of a tenant may prevent him from the exercise of his right to detach his annexations, which is the same as to say that his agreement having shown that it was not his intention to remove them, the presumption of contrary purpose, which would otherwise arise, is repelled. So in *Potter v. Cromwell* (40 N. Y., 287, and cases cited), it is conceded that if the intention of the vendor of lands be to retian, in chattels annexed thereto, their character as personal property, such intention will prevail. So in *Voorhees v. McGinnis* (*supra*), it is conceded that if the intention of the mortgagor of lands had been that chattels annexed were to be removable, the prior mortgagee could not have held them against the receiver of the goods, &c., of the mortgagor. (See also *Crane v. Brigham*, 11 N. J., Eq.; [3 Stockton, 29, 35]; *Teaff v. Hewitt*, 1 Ohio St.—[McCook—511-531.] The general rules governing the rights of parties in chattels thus annexed to the real estate, rest, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different: not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence, I conclude that the agreement of the owner of the land with the plaintiffs, as it did fully express their distinct purpose that these annexations of boiler and engines should not make them a part of the real estate, was sufficient to that effect, without any concurring intention of the defendants as prior mortgagees.

Though the defendants became the purchasers of the land on the foreclosure of the mortgages, and were the owners of it in fee, and probably in actual possession of it, and of the boilers and engines annexed to it, before this action was brought or demand made of them for these chattels, yet they are to be considered in this case only as prior mortgagees of it. Such is the effect of the stipulation made by them that the sale upon the decrees should not in any manner change the legal rights of the plaintiffs in this action; but for this,

it would have been necessary to have determined the effect upon the rights of the parties of the sale on foreclosure, and the change of title and possession of the lands, and the application to that state of facts of the principle laid down in *Lane v. King* (8 Wend., 584), and kindred cases.

It appears that the boilers and engine cannot be removed without some injury to the walls built up about them, and which are a part of real estate; yet this fact will not debar the plaintiffs. The chattels have not become a part of the building; the removal of them will not take away or destroy that which is essential to the support of the main building, or other part of the real estate to which they were attached; nor will it destroy or of necessity injure the chattels themselves; nor will the injury to the walls about them be great in extent or amount. So that the limitation hereinbefore stated does not apply.

It is proper to add, that the English case cited and much relied upon by the defendants has not been overlooked. (*Walmsley v. Milne*, 7 C. B. N. S.,* 115.) I do not gather from it that the decision was placed upon the ground (as the defendants claim), that the mortgagee of the land did not expect or understand that the chattels annexed were removable or to be removed. The opinion of the court seems summed up in the concluding sentence: "We think, therefore, that when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a *permanent purpose* and for the better enjoyment of his estate, he thereby made them a part of the freehold which had been *vested by the mortgage deed in the mortgagee*." It is to be borne in mind, too, that in England and in Massachusetts the rights of a mortgagee of land in the mortgaged premises are greater than in this state. He is regarded as the owner, and the mortgagor in the light of a tenant. So that things annexed to the land become fixtures upon the land of the mortgagee, as it were. (See case last cited, page *133; *Butler v. Page*, 7 Mete., 40.)

The judgment should be affirmed with costs to the respondents.
All concur.

Judgment affirmed.

In this section have been included only cases dealing with waste by the mortgagor. The effect of similar acts committed by the mortgagee are considered in connection with his liability to account post p. 183 *et seq.*

CHAPTER II.

EQUITY RELATIONS.

(a) *Once a Mortgage, Always a Mortgage.*

NEWCOMB v. BONHAM.

[1 Vern. 7, 214, 232—1681-1683.]

A man being seised of lands in fee, makes an absolute conveyance thereof to the defendant Bonham; but by another deed of the same date the lands are made redeemable upon payment of £1,000 and interest at any time during the life of the grantor; and in case the lands should not be redeemed in his lifetime, then he covenants that the same should never be redeemed. The grantor dies before the lands are redeemed, and his heir at law exhibits a bill to have a redemption.

It was in proof in the cause that the mortgagor had a kindness for the mortgagee, as being his near relation, and did intend him the lands after his death, and that the clause of redemption was put in only upon the account that the mortgagor was then a bachelor, and so might marry, and have issue; but that his full intent was, that in case he died without issue the mortgagee should have the lands absolutely without redemption; and also that the said one thousand pounds was really the full value of the estate at the time of the conveyance, but it afterwards happened to be a good bargain, it being a reversion after two lives, and the two lives happening to die within a short time; and it was urged that the mortgagee ran hazard enough, for that as it happened to be a good bargain, it might have been a bad one, and yet he had no covenant nor any other remedy to compel the repayment of his money, for the mortgagor had time to redeem during life; and suppose the mortgagor should have lived thirty or forty years after the mortgage made, and then had come to redeem, as he might have done, there had been all the interest upon interest thereby lost, which comes to more than the principal.

The Lord Chancellor Nottingham was of opinion, that although the mortgagor had time to redeem during life yet the mortgagee might have compelled him to redeem, or have foreclosed him; and said that it was a general rule, *once a mortgage, and always a mortgage*; and in regard the estate was expressly redeemable in the mortgagor's lifetime, it must continue so afterwards, and therefore decreed an account and a redemption.

* * * *

This case came now before the court upon a demurrer to a bill of review to reverse a decree made in this cause by the Lord Chancellor Nottingham: and the error assigned was that the defendant Newcomb ought not to be admitted to a redemption against his express agreement in the mortgage deed to redeem within a certain time, or otherwise that the estate should be irredeemable.

It was argued for the demurrer.

1st. That an estate could not be a mortgage at one time, and afterwards become an absolute purchase, by one and the same deed.

2d. That the mortgagee in this case had a proper remedy, and might have made his estate absolute in a legal course, viz., by exhibiting a bill to foreclose the mortgagor of the equity of redemption; and they cited the case of Yieldmington and Gardiner, where the mortgagor was to redeem during life *only*, and yet his heir admitted to the redemption; and Sir Robert Jason's case, where an estate was to go to his wife and her heirs, unless a sufficient jointure were settled within such a time limited in the deed, and the case of Howard and Harris.

But as to that case, it was answered, though there was a qualified redemption, yet there was an express covenant for repayment of the mortgage money, and so it was in the power of the mortgagee to make it a mortgage at any time.

But the Lord Keeper inclined to reverse the decree, for that *modus et conventio vincunt legem*; and all conditional purchases or bargains must not be turned into mortgages; and said, that where there is a condition or covenant, that is good and binding in law, equity will not take it away.

This cause coming on to be heard *de integro* before the Lord Keeper, he adhered to his former opinion: that there ought to be no redemption in this case; and principally, because it was proved in the cause, that the intent and design of the mortgagor was to make a settlement by this mortgage, and that he intended a kindness and benefit to the mortgagee, in case he should not think fit to redeem this estate in his lifetime; and that there being an express covenant that the mortgagor might redeem at any time during his life, he thought he could not in equity have been debarred of that privilege; for by a bill to foreclose a man, you shall only bar him of his equitable title when the estate in law is become forfeited; but where he has a continuing title at law, as in this case, an express proviso that he might redeem at any time during life, he thought equity could not debar him of that privilege; and, therefore, being the mortgagee in the present case could not have compelled the mortgagor to redeem, and he might have lived so long as to have made it an ill bargain; and now, when by a contingency it happens to be a good bargain, there is no reason to raise an equity from thence to take the estate from the mortgagee: especially in this case there being a kindness and benefit intended him by the mortgagor; and therefore reversed the Lord Nottingham's decree and dismissed the original bill for a redemption.*

* Reg. Lib., 1683.—A., Folio 482. And this dismissal was afterwards, 1 May, 1689, affirmed in Parl. Jour. II. of L., 14 vol. 17d. Bonhaus v. Newcomb, 2 Vent, 365 and 193.

VILLA v. RODRIGUEZ.
[12 Wall. 323, 336—1870.]

Mr. Justice Swayne delivered the opinion of the court. This is an appeal in equity from the decree of the Circuit Court of the United States for the District of California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant, Rodriguez, claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That propoer is his if his title be valid.

The widow is the sister of the defendant, Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez, for money then borrowed, a note for four thousand dollars, payable a year from date, and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision, that in default of the payment of the interest as stipulated, the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt, and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid \$1,172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and

five children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about \$10,000. On the 17th of February, 1863, one of the children, who was a minor when this deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was \$100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase by paying him \$25,000 in gold, and upon such payment being so made he covenanted that he would, by a sufficient deed, release and quit claim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavincencia.

The lessees and their assigns insist that they are *bona fide* purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase money fully paid. The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor.

This contract calls for a quit-claim deed. The result would be the same if such a deed had been executed and full payment made, without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection. This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que* trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every

doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law.

The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans might well have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added “that they ought not to distrust him, as he was taking all these steps for their interest.” The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez, on the same day, “which was altogether unsolicited,” says: “He stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and his family, while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister.” Rodriguez was examined as a witness. Referring to a period shortly preceding the execution of this deed, he says: “Afterwards I had with them further conversation, and told them, I don’t wish to speculate upon you, because you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I

will return you the surplus money, if any; and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch, but if I have bad luck and cannot sell it, I will lose my money." Elsewhere, in the same deposition, he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The rents, issues and profits, and improvements made upon the premises must also be taken into the account.

The decree is reversed and the cause will be remanded to the Circuit Court with directions to enter a decree and proceed in conformity to this opinion

ODELL v. MONTROSS.
[68 N. Y. 499—1877.]

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, in favor of defendant, entered upon an order reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term and directing judgment for defendant.

This action was brought to have a deed, absolute on its face, declared a mortgage, and for an accounting and reconveyance on payment of amount due.

The court found, in substance, that in July, 1865, plaintiff, being indebted to defendant for moneys loaned and advanced, executed to said defendant a deed of the premises described in the complaint, which deed was absolute on its face, and purported to convey the fee, but that it was executed as and intended as a security for the said indebtedness then existing, and what might thereafter accrue,

and it was agreed and intended by the parties that plaintiff, upon payment, should have the right to redeem and should be entitled to a reconveyance. That in September, 1866, defendant paid to the plaintiff, at his request, the sum of fifty dollars, and plaintiff then and there signed and delivered to the defendant a paper, of which the following is a copy, viz.:

"New York, Sept. 17, 1866.

"Received from William Montross fifty dollars, in full satisfaction for all claims and demands whatsoever as to the conveyance of property, or otherwise, up to this date.

"THOMAS B. ODELL."

That such payment was made and received, and such receipt signed and delivered with the intention of the parties that the same should be a full settlement of all claims of plaintiff to said lands and premises, and of all claims to any reconveyance thereof. As conclusions of law the court found, that the deed was to be considered as a mortgage; that the payment of the fifty dollars and the receipt given therefor did not operate to change the nature of the deed from a security to an absolute conveyance, nor to release plaintiff's right to redeem, and that upon payment of the sums due from plaintiff to defendant and the sums paid out by the latter, plaintiff was entitled to redeem; and judgment was directed adjudging that upon payment of such sums within thirty days defendant should reconvey, and in default of such payment that the premises be sold, as in foreclosure sales. Judgment entered accordingly.

ALLEN, J. Prior to the transaction of the 17th of September, 1886 when the defendant upon the payment of fifty dollars to the plaintiff took an unsealed paper signed by him acknowledging the receipt of the fifty dollars "in full satisfaction for all claims and demands whatsoever as to conveyance of property or otherwise, up to this date," the relation of the parties in respect to the lands now sought to be redeemed was that of mortgagor and mortgagee with all the incidents of that relation. (4 Kent's Com., 143.) The plaintiff had conveyed the premises to the defendant by deed absolute in terms, but the conveyance was not intended as a sale, but as a security for the payment of money, and although there was no defeasance in writing, the intent could be and was shown by parol evidence, and the deed was but a mortgage. Parol evidence is admissible to show that an absolute deed was intended as a mortgage, or that a defeasance has been destroyed by fraud or mistake. (Dey v. Dunham, 2 J. Ch. R., 182; Clark v. Henry, 2 Cow., 324; Marks v. Pell, 1 J. Ch. R., 594; Horne v. Kettletas, 46 N. Y., 605.) A conveyance absolute in terms given as a security, is a mortgage with all the incidents of a mortgage and the rights and obligations of the parties to the instrument are the same as if the deed had been subject to a defeasance expressed in the body of the instrument, or executed simultaneously with it. (4 Kent Com., supra.) It must be recorded as a mortgage and not as a deed. (Dey v. Dunham, supra.) This case was reversed in 15 Johnson's Reports, 555, but this principle was recognized by the appellate court that reversed the decree of the chancellor. The reversal was on the ground that the subsequent

purchaser claiming adversely to the deed was not a purchaser in good faith, and so not within the protection of the recording acts. (James v. Johnson, 6 J. Ch. R., 417; 2 Cow., 249.) In White v. Moore (1 Paige, 551), the chancellor held that the fact that there was no defeasance in writing did not take the instrument out of the effect of the statute, requiring all mortgages to be recorded as mortgages.

The estate remaining in the mortgagor after the law day has passed, before foreclosure, is popularly but erroneously called an equity of redemption, retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity. Although a misnomer it does not mislead. The legal estate remains in the mortgagor and is subject to dower and curtesy, to the lien of judgments, may be sold on execution and may be mortgaged or sold as any other estate in lands, while the mortgagee has but a lien upon the lands as a security for his debt and the land is not liable to its debts, or subject to dower or curtesy, or any of the incidents of an estate in lands. (2 Wash. R. P., 152 and seq.; Jackson v. Willard, 4 J. R., 41; Powell on Mortgages, 258, N. L.) The mortgagor is possessed of an estate in the land in virtue of his former and original right, and there is no change of ownership. So far as the entire estate is concerned, there is but one title, and this is shared between the mortgagor and mortgagee, the one being the general owner and the other having a lien which, upon the foreclosure of the right to redeem, may ripen into an absolute title, their respective parts, when united, constituting one title. A mortgagor and mortgagee may, at any time after the creation of the mortgage and before foreclosure, make any agreement concerning the estate they please, and the mortgagee may become the purchaser of the right of redemption. A transaction of that kind is, however, regarded with jealousy by courts of equity, and will be avoided for fraud, actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining it. It will be sustained only when *bona fide*; that is, when in all respects fair, and for an adequate consideration. (Trull v. Skinner, 17 Pick., 213; Patterson v. Yeaton, 47 Maine, 306; Ford v. Olden, L. R. 3 Eq. Cases, 461; Kaldridge v. Gillispie, 2 J. Ch. R., 30; Wash. on Real Prop., ch. 16, sec. 1, pl. 24.)

The defendant claims to have extinguished the right of redemption and acquired the entire estate by the payment of the fifty dollars, and in virtue of the written acknowledgment of its payment for the purpose named in it. The paper is in its terms ambiguous. It does not purport to convey or transfer any property or estate in lands, but is declared to be in full of all claims and demands whatsoever as to conveyance of property or otherwise. It is but a parol admission of a satisfaction for the right mentioned. The apparent meaning of the instrument is to admit a satisfaction of all claims against the defendant, claims and demands that may be enforced whether such claims are of a right to a conveyance of property or any other matter. The plaintiff required no conveyance of the lands from the defendant. Upon the payment of the mortgage debt he

would have been reinvested with the unincumbered title without conveyance or release from the defendant. As evidence of his title he might have required a reconveyance or a satisfaction of the mortgage, and that the courts would have compelled. But his right of redemption was not, in any sense, a "claim or demand as to conveyance of property or otherwise." The receipt had upon its face, and without explanation, respect to personal claims and demands against the defendant. But the transaction was explained upon the trial, and shown to have been intended as a full settlement of all claims of the plaintiff to the lands and premises and of all claims to a reconveyance thereof. If this payment and receipt did operate to change the nature of the deed from a mortgage to an absolute conveyance, and is a release of the right to redeem so that the mortgagee became seised in fee simple by a union of the estates of the mortgagor and mortgagee discharged of the mortgage, the difference to the action is perfect. It cannot be claimed that the written paper *ex proprio vigore*, could have that effect. It does not profess to release the right of redemption, or to convey any lands or interest in lands. No lands in particular are referred to. No agreement can be spelled out of the instrument which could be specifically performed, and it could not be aided and made a perfect contract to release or convey lands by parol proof. The whole force of the transaction, as affecting the rights of the plaintiff, is in the payment and receipt of the fifty dollars with intent to extinguish the title of the plaintiff. This cannot operate as an estoppel or take the case out of the statute of frauds. The mere payment of money will not entitle a purchaser to a specific performance of a parol contract for the purpose of an interest in lands. That can be repaid with interest, and no damage ensues from the non-performance of the contract. The purchaser can be made good for the use of his money, which is all that he has lost. Had the defendant, acting upon the faith of this transaction, entered into possession of the premises and incurred expenses, and substantially changed his situation so that he could not be placed in the same situation in which he was before, it might have estopped the plaintiff from taking shelter under the statute of frauds, or alleging the insufficiency of the written instrument to carry out the agreement and intent of the parties. But there are none of the elements of an equitable estoppel in the case as presented by the record.

The plaintiff having a recognized legal estate in fee, he could only be divested of it (except by way of estoppel which does not exist) by some instrument which would be valid under the statute of frauds, and in compliance with the statute prescribing the mode and manner of conveying lands. The statute of frauds (2 R. S., 135, Sec. 8) is very explicit, and needs no interpretation in its application to this case. It declares that every contract for the sale of any lands, or any interest in lands, shall be void, unless in writing, and subscribed by the party by whom the sale is to be made. The whole contract, that is, the agreement to sell and the description of the lands or the interest in lands agreed to be sold, must be in writing and subscribed by the party. The other statute referred

to (1 R. S., 738, Sec. 137) is equally applicable to this case. To hold that the plaintiff had not a fee would be to overthrow the well-established relation of mortgagor and mortgagee, and reverse their respective positions in respect of the legal estate in the lands mortgaged. The statute declares that every grant in fee or of a freehold estate, shall be subscribed and sealed by the person making the grant, or his lawful agent. If a seal only was wanting to make the instrument relied upon by the defendant valid for the purposes intended, it is possible that the court might compel the sealing, but that would not supply the intrinsic defects of the paper-writing itself.

What is said in *Stoddard v. Whiting* (46 N. Y., 633) of the nature of the estate of a mortgagor, and the bearing of the statutes quoted upon a conveyance of his estate, was not necessary to the decision of the case, or necessarily adjudged by the court. The plaintiff there, who was enforcing an equity of redemption, which was resisted, claimed under a written but unsealed assignment (a parol writing) from the mortgagor, and that was held sufficient to give him a standing in court, and enable him to maintain the equitable action to redeem. The decision is not in conflict with the views here expressed. The defendant could have acquired the estate and interest of the plaintiff either by a deed-poll as a release, or a grant in any form sufficient in terms and mode of execution to convey an estate in lands. Mr. Powell, in his treatise on mortgages (Vol. 1, p. 260), in speaking of the methods by which a mortgagee may acquire the interest of the mortgagor, says that it may be by indenture with covenants, or a release by deed-poll, for by that means the estate of the mortgagor and mortgagee will become merged, and the mortgagee will be owner in fee of the whole estate.

The rights of the mortgagor and his estate can only be foreclosed by due process of law, or a release by deed in proper form, or a conveyance sufficient to pass the title to an estate in fee. The defendant has not purchased the equity of redemption or acquired the estate of the plaintiff by any proper release or conveyance. No injustice will be done the defendant by the result to which this conclusion leads. He will receive his money and interest, and will be fully indemnified, and he is not entitled to speculate in his dealings with his mortgage-debtor.

The judgment of the Special Term might have directed a redemption, upon the proper terms, within a specified time, or in default thereof the plaintiff be foreclosed. That, I think, would have been the proper judgment. But as no fault is found with the terms of the judgment at Special Term, the judgment of the General Term should be reversed and that of the Special Term affirmed.

All concur, except Rapallo, J., not voting.

Judgment accordingly.

37 HUGHES v. HARLAN
Appellate Division, 1899.

Appellate Division, First Department.—Appeal by defendant from interlocutory judgment rendered at Special Term after trial.

Plaintiff's testator, Albert E. Hughes, executed and delivered to the defendant a written instrument by which certain personal property, including a formula for the manufacture of "Albert's Rheumatic and Gout Remedy," was transferred to the defendant subject to the condition that if the testator paid his promissory note for \$3,000, payable to the order of the defendant, then the transfer should become null and void. The instrument, however, provided that if the testator died before the note was paid, then the transfer was to be unconditional and absolute. At the time the instrument was executed the plaintiff's testator was, and until his death which occurred a few days later, he continued in possession of the property transferred, when the defendant took possession. The plaintiff was appointed administrator with the will annexed and a tender having been made of the amount remaining due upon the note, accompanied with a demand for the possession of the property which defendant refused, this action was brought to compel, among other things, the defendant to deliver to the plaintiff the formula for the remedy. The defendant by his answer denied substantially all the allegations of the complaint and alleged that upon the death of plaintiff's testator before the payment of the note, the formula became his sole and absolute property.

The trial court held that the instrument was a chattel mortgage, and that the plaintiff had the right to redeem the property covered by it, subject to the payment of any indebtedness to the defendant which might be found due upon an accounting. Judgment was entered to that effect, from which the defendant has appealed.

McLAUGHLIN, J., after stating the facts above, said: The conclusion reached by the trial court was correct. The instrument was not a bill of sale. It was a chattel mortgage and nothing else. It was given as collateral security for the payment of the note, and expressly provided that it was to become absolutely null and void upon such payment. The provision inserted in it that if the payment was not made during the lifetime of the mortgagor that the transfer should then become unconditional and absolute, did not change the character of the instrument in any respect. Default in the payment of the sum secured by the mortgage occurred when the testator died, and then the legal rights of the parties were exactly the same as though default had been made by the testator in his lifetime. The title to the mortgaged property then vested at law in the defendant, and nothing was left to the plaintiff except an equitable right to redeem (*Charter v. Stevens*, 3 Den., 33; *Stoddard v. Dennison*, 38 How. Pr., 239), which did not depend upon any agreement of the parties. It was something independent and irrespective of the parties to the mortgage, which the law gave, and which it would not permit them, even by agreement, to take from the mortgagor. (*Jones on Chattel Mortgages*, sec. 682; *Henry v. Davis*, 7 Johns Ch. 40; *Clark v. Henry*, 2 Cow., 330; *Bunacleigh v. Poolman*, 3 Daly, 237; *Baily v. Baily*, 71 Mass., 505; *Newcomb v. Bonham*, 1 Vern., 7.) . . . *Newcomb v. Bonham* (*supra*) is directly in point. There an absolute conveyance was given, with a defeasance upon the payment of £1,000 during the lifetime of the

grantor, and the grantor agreed that the premises conveyed should never be redeemed after his death. The grantor died before payment, and in proceedings by his representatives to redeem, the Lord Chancellor held that such a right existed, and a decree was entered to that effect.

"Under the authorities cited it is clear that the plaintiff had a right to redeem. It is, however, urged by the appellant's counsel that the complaint cannot be considered as one to redeem, and that it is insufficient for that purpose. . . . The facts alleged in the complaint were sufficient to show in the plaintiff a right to redeem, and the action was properly treated by the trial court as one instituted for that purpose (*Cassidy v. Witherbee*, 119 N. Y., 522; *Rogers v. N. Y. and T. L. Co.*, 134 N. Y., 219). The judgment, therefore, was right." Affirmed. All concur.

WILLIAMS v. TOWNSEND.

[31 N. Y. 411—1865.]

This was an action to enjoin the sale of mortgaged premises under a statutory foreclosure.

DAVIS, J. By the condition of the bond and mortgage the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgaged premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage. And the principal question in this case is, whether the purchase of the premises at the tax sales and the taking certificates of such purchase under the provisions of the charter of Buffalo, were a discharge of the assessments and taxes, within the true construction of the bond and mortgage.

By section 20 of title 5 of the charter of the city of Buffalo, as revised by the laws of 1856, it is provided that the owner of any real estate sold for taxes may at any time before a declaration of sale is granted, as elsewhere provided by the charter, redeem the same by paying to the city treasurer, for the benefit of the holder of such certificate, the amount paid by him with the addition of 15 per cent. per annum on such amount.

The certificates are transferable; and it cannot always be easily ascertained who the holder is. Hence the statute has provided that the redemption may be made by payment to the city treasurer. In all cases of sales for taxes the owner of the land is clothed by law with this right of redemption; and the tax together with the expenses of the sale remain a lien on the premises assessed, with an addition thereto of fifteen per cent., until the redemption or payment to the treasurer is made. The effect of the sale is therefore merely an assignment of the lien of the tax and the expenses then incurred, enhanced by the additional percentage; and this lien continues till the owner of the land makes the redemption, or the holder of the certificate takes title to the property in the prescribed form. It is therefore clear that the tax or assessment is not discharged by the sale and certificate. In this case the purchase at the tax sale was

made by M. E. Viele, and the certificates of the comptroller were made to him, as he says, "for convenience of transfer." He was in fact the agent of the defendant, but there was nothing in the manner of sale or form of the certificate to indicate that fact. The legal rights of the parties are perhaps the same as though the certificate had been made to the defendant; but it would certainly be very embarrassing to titles of real estate if the owner's right of redemption were dependent upon some undisclosed relation of agency between the apparent purchaser and the incumbrancer of the land. There would be no safety for him if he were not allowed to redeem; because the ostensible purchaser could transfer the certificate to a bona fide holder and subject him to great embarrassment and perhaps to the loss of his land. A mortgagee, who desires to pay off taxes or assessments and charge them on the mortgaged premises has a very plain course to pursue. At any stage of the proceedings he can step forward in his character of mortgagee and pay the assessment or redeem from a sale before the purchaser's title has actually ripened by a conveyance under the law. It is no hardship to require him to do this in a plain and distinct manner, so as not to embarrass the title of the mortgagor or owner. When, however, he purchases at a tax sale and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser, with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law.

But it is insisted that the purchase and taking of the certificate by a mortgagee, who has the right by the terms of his mortgage, or under the general statute, to pay off taxes and add the amount so paid to the lien of his mortgage, is by operation of law, *ipso facto*, an extinguishment and discharge of the tax. To support this proposition the familiar principle that a person who is placed in a situation of trust or confidence in reference to the subject of the sale, or has a duty to perform which is inconsistent with the character of a purchaser, cannot be a purchaser on his own account. (*Torry v. The Bank of Orleans*, 7 Paige, 649; *Van Epps v. Van Epps*, 9 Paige, 257; *Burhans v. Van Zandt*, 3 Seld., 523.)

But this principle has never been carried so far as to prevent a junior mortgagee from purchasing the subject matter of the mortgage at a sale under a prior lien; nor has it been held that a title fairly purchased at such sale was held for the benefit of the mortgagor. A mortgage is a mere security for a debt; and there is no such relation of trust or confidence between maker and holder of a mortgage as prevents the latter from acquiring title to its subject matter, either under his own or any other valid lien. The defendant had no duty to perform to the plaintiff or toward the mortgaged premises that precluded her from buying at the tax sale. She was under no obligation to pay the taxes. The plaintiff had covenanted that she might do so at her option, and thereby acquire certain rights; but she had not undertaken to do it nor subjected herself to any burthen or obligation whatever in respect to the assessment of taxes. She might pay them or not, as she chose, or she

might stand upon her general rights and purchase at the tax sale, as others could do, for the purposes of investment or protection. But if this were not so, all that the principle sought to be invoked would require is that as the purchaser she should take a redeemable interest only, which never could ripen as against the mortgagor into a greater one, and not that the lien she purchased should be discharged or extinguished, leaving her to no remedy except the possibly inadequate one under the covenants of the bond and mortgage. It is my opinion, therefore, that the purchase at the tax sale did not operate to discharge the assessment and deprive the plaintiff of his right of redemption under the statute.

But it is urged that the failure of plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises, does not have the effect claimed for it, nor do I think it would countervail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due with the expenses of sale. (3 R. S., 5th ed., p. 860, sec. 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes; to give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that "such assessments, taxes and charges as shall have been paid by them" may be retained.

Besides, in my judgment, a mere naked breach of such a covenant in the condition of a mortgage, without the payment of any amount, would give no right to commence a foreclosure under the statute, but this it is not necessary to determine.

I think the judgment should be affirmed.

Judgment affirmed.

TEN EYCK V. CRAIG—62 N. Y. 420 (1875). Action to redeem:
ANDREWS, J.—

It is claimed that Craig was disabled from purchasing the Congress Hall property at the sheriff's sale, and holding it adversely to Stewart and Sanger, under the rule just adverted to. There are two grounds upon which this claim is based: First, that Craig at the time was mortgagee in possession; and, second, that the relation of trustee and *cestui que trust*, in respect to the property, was created between Craig and Stewart by the instrument of April 24, 1860, which precluded him from purchasing for himself, or otherwise than as a trustee for Stewart, or his grantee. Assuming that the learned counsel for the plaintiff is correct in the position that Craig, at the time of the sheriff's sale, stood in relation to the premises, in the character of mortgagee in possession the question arises whether a mortgagee in possession can buy the mortgagor's

title on an execution sale, upon a judgment in favor of a third person against the mortgagor, and set up a title under the sale, as defense to an action by the mortgagor to redeem. Another mode of stating the question is: Is a mortgagee in possession a trustee for the mortgagor, so that he will not be allowed to buy in the equity of redemption on a sale upon an independent lien held by a third person?

Unless the mortgagee in possession is a trustee for the mortgagor, there is no ground upon which he can be precluded from purchasing. It is clear that no trust relation between the mortgagor and mortgagee is created by the execution of the mortgage, unaccompanied by possession. The mortgage under our law is a security merely. The mortgagee has, by virtue of his mortgage, no estate in or title **to the land, or the right of possession**, before or after the mortgage debt becomes due. He owes the mortgagor no duty to protect the equity of redemption. The power of sale which usually accompanies a mortgage is given to enable him, by an adverse proceeding, to sell the equity of redemption for the payment of the mortgage debt. The objection that he could not become the purchaser at his own sale under the power has been removed by the statute when the foreclosure is by advertisement (2 R. S., 546, Sec. 7); and a provision is inserted in every decree for sale of mortgaged premises, unless otherwise specially ordered, that the plaintiff may become the purchaser. (Rule 73.) And he may buy in any outstanding title and hold it against the mortgagor. (Cameron v. Irwin, 5 Hill, 280; Williams v. Townsend, 31 N. Y., 415; Shaw v. Bunny, 13 Week. R., 374; s. c., 2 DeG., J. & S., 468.)

There is, in truth, no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. The mortgagee is not a trustee of the legal title, because, under our law, he has no title whatever. (Kortright v. Cady, 21 N. Y., 342, and cases cited.) He may deal with the mortgagor, in respect to the mortgaged estate, upon the same footing as any other person; he may buy in incumbrances for less than their face, and hold them against the mortgagor for the full amount; he may do what any other person may do, and his acts are not subject to impeachment, simply because he is mortgagee. (Darcy v. Hall, 1 Vern., 48; Knight v. Majoribanks, 2 MacN. & G., 10; Chambers v. Waters, 3 Sim., 42; 3 Sug. on V. and P., 227.)

Nor is the mortgagee converted into a trustee by taking possession as mortgagee of the mortgaged property, so as, in general, to prevent his purchasing an outstanding title, or under another lien. Under the English law he has the right to the possession because he has the legal title to the land. Under our law he cannot obtain possession until foreclosure, except by the consent of the mortgagor, because until that he has no title. A mortgagee is often called a trustee, and in a very limited sense this character may be attributed to him. There may be a duty resting upon a mortgagee in possession to discharge a particular claim against the land. If in such a case he omits to do it, and allow the land to be sold on such a claim,

and becomes the purchaser, he would hold the title in trust for the mortgagor. A mortgagee in possession is allowed, and it may be his duty to pay taxes on the land out of the rents and profits. If he suffers the land to be sold for taxes in violation of his duty, and purchases on the sale, he would upon general principles be deemed to hold the title as trustee. So, if a mortgagee is allowed to take possession and undertakes to pay the interest on other lines out of the rents and profits and fails to do so, he could not purchase the land for his own benefit in hostility to the mortgagor on a foreclosure of an incumbrance for non-payment of interest which he was bound to pay. A mortgagee in possession is bound to account for the rights and profits; and in that respect, as was said by Shaw, C. J., in *King v. Insurance Co.* (7 Cush., 7), he may be denominated a trustee. But, except in some special sense, that is not the relation he bears to the mortgagor.*

HALL v. WESTCOTT.
[15 R. I. 373—1886.]

Bill in equity to redeem a mortgage and for an account.

DURFEE, C. J. The bill states that on October 23, 1873, Walter J. Reynolds, being the owner of a lot in Providence, mortgaged it for \$800 to Stephen H. Williams; that subsequently the lot passed by mesne conveyances to Charles W. Adams, who, December 30, 1874, gave two mortgages thereon to Hiram C. Pierce, to-wit: one for \$3,250 and one for \$500, subject to the mortgage for \$3,250; that the mortgage for \$3,250, though taken solely in Pierce's name, belonged equally to him and the complainant, Harriet Hall; that Pierce assigned the mortgage for \$3,250 to the defendant, Charles A. Westcott, who thereupon, January 23, 1875, gave the complainant Harriet Hall a writing in which he declared that he held said mortgage as to one-half in trust for her; that said Pierce subsequently assigned said mortgage for \$500, and his interest in said mortgage for \$3,250 to said Harriet, and that said mortgage for \$500 contained a power of sale, under which, in January, 1882, said Harriet duly sold the estate, buying it herself under notice as authorized by statute. The bill alleges that the defendant is in possession, and contains other allegations. It asks for an account and for leave to redeem. The defendant sets up several defenses.

The third defense is that the mortgaged lot was sold for the non-payment of taxes, and bought by and conveyed to the defendant. This raises the question whether a mortgagee or his assignee, out of possession, can become a purchaser at a tax sale with the same effect, as against the mortgagor and other mortgagee, as if he were a stranger to the estate. There is some conflict of authority on this point. All the cases agree that there are persons who stand in such relations to the estate that they cannot purchase as if they were strangers. No person whose duty it is to pay the tax can be per-

**Trimm v. Marsh*, 54 N. Y., 599; *see* *infra* p. 116.

mitted to purchase at a sale for its non-payment, and acquire a good title as against others who are interested in the estate, since to permit him to do so would be to permit him to profit by his own default. Under this rule mortgagors, mortgagees in possession, life tenants, and tenants obligated by contract to pay taxes, are incapacitated to become purchasers. The incapacity has likewise been held to extend to tenants in common, for, if the estate is sold for taxes to one of the tenants, it is sold for his default as well as for the default of his co-tenants. (Page v. Webster, 8 Mich., 263; Butler v. Porter, 13 Mich., 292; Cooley v. Waterman, 16 Mich., 366; Cooley on Taxation, 346, 347.) So a person who occupies a fiduciary relation as regards the estate, cannot purchase it for himself. The trust in the one-half of the mortgage for \$3,250 is protected under this rule. And there are cases which enounce, or at least presuppose, a still broader doctrine, which may be stated thus, namely: that a purchaser who has an interest in the estate, such as would entitle him to redeem it if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. We find this doctrine nowhere more clearly asserted than in *Fair v. Brown*, 40 Iowa, 209. The defendant there was interested in the estate by judgment lien and as a second mortgagee. He bought certificates of sale for taxes, and subsequently took the tax deed. The court held that the prior mortgage was not defeated. "The land," says the court, "is a common fund for the payment of the plaintiff's,"—i. e., the prior mortgagee's—"mortgage and the defendant's liens. Defendant was authorized to redeem from the tax sale. Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his liens. He cannot obtain that protection by pursuing a course that will deprive the mortgagee of his security, and leave the mortgagor to sustain the weight of the liens, which are personal judgments, after being deprived of his property by tax title." (*Garrettson v. Scofield*, 44 Iowa, 35; *Porter v. Lafferty*, 33 Iowa, 254; *Stears v. Hollenbeck*, 38 Iowa, 550.) In *Middletown Savings Bank v. Bacharach*, 46 Conn., 571, the defendant, having had an undivided eighth of an estate subject to a mortgage, set out to him under an execution, purchased the estate at a sale for taxes assessed before he became interested in it, and the court held that he could not set up the tax title to defeat the mortgage, he being entitled to redeem the mortgage, which yet he could not do, if the mortgagee had paid the taxes, without reimbursing him. The court also said that the mortgagee was similarly incapacitated, because he could pay the tax and add the amount of it to the mortgage debt. In *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich., 113, the court lays down the doctrine that where a mortgagee, or one of two or more mortgagees, purchases the estate at a tax sale, the purchase may be

treated as payment. "It is as just and as politic here," says the court, "as it is in the case of tenants in common, to hold that the purchase is a payment of the tax." In the later case of *Maxfield v. Willey*, 46 Mich., 252, the court affirms the doctrine. "When the mortgagee," says the court, "instead of making payment of the taxes, makes a purchase of the land at tax sale, we have no doubt of the right of the mortgagor to have the purchase treated as a payment, and to compel the cancelment of the certificate or deed on refunding the amount paid with interest." The opinions in these cases were delivered by Judge Cooley, who, in the preparation of his book on Taxation, had occasion to make the subject a special study.

The most recent case which we have met with is *Woodbury v. Swan*, 59 N. H., 22, in which the Supreme Court of New Hampshire decided that the holder of a mortgage cannot defeat a prior mortgage by acquiring a tax title. The court rest their decision on the following reasons, as declared by Bingham, J., in delivering the opinion of the court: "Mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sale for non-payment of taxes, and against outstanding tax titles; and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles. Therefore, the mortgage contract comprises an implied agreement that, while either party may buy a tax title for the preservation of his right in the mortgaged property, neither of them will buy a tax title for the extinguishment of the title, in the maintenance of which they, as well as partners and tenants in common are in law jointly concerned. The common interest of these parties in the mortgaged property creates a relation of trust and confidence."

Other cases may be cited which support the same view, though not always for the same reasons. (*Moore v. Titman*, 44 Ill., 367; *Harkreader v. Clayton*, 56 Miss., 383; *Haskell v. Putnam*, 42 Me., 244; *Bassett v. Welch*, 22 Wis., 175; *Whitney v. Gunderson*, 31 Wis., 359, 379; *Chickering v. Failes*, 26 Ill., 507; *McLaughlin v. Green*, 48 Miss., 175.) In California it is held that a person who is under any obligation, either moral or legal, to pay the taxes, cannot become a purchaser. (*Moss v. Shear*, 25 Cal., 38; *Christy v. Fisher*, 58 Cal., 256.)

Other cases adopt a narrower view, and maintain that any person can become a purchaser who is not under any legal duty to pay the taxes. (*Williams v. Townsend*, 31 N. Y., 411; *Waterson v. Devoe*, 18 Kans., 223; *Bettison v. Budd*, 17 Ark., 546; *Ferguson v. Etter*, 21 Ark., 160.)

Our conclusion is that a mortgagee, either in possession or out of possession, is not entitled to purchase the estate at a tax sale, and set up the tax title as against the mortgagor or the other mortgagees. They all have a common interest in the preservation of the estate, and therefore, if either of them purchases the estate at a tax sale, it should be presumed in favor of the others that he made the purchase for the common protection.

We think a case is shown which entitles the complainants to relief.

(b). *Mortgagee's Liability to Account.*

HANSON v. DERBY.

[2 *Vernon* 392—1700.]

The bill being to redeem a mortgage, on the hearing an account was decreed, and £240 reported due; to which report the plaintiff had taken exceptions. The cause, thus standing in court, the LORD KEEPER, on a motion and reading affidavits, that the defendant had burnt some of the wainscot, and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a pauper, giving security to abide the event of the account. *

RUSSELL v. SMITHIES.

[1 *Anstruther*, 96—1792.]

On a bill of foreclosure, it was referred to the Deputy Remembrancer to take an account what the mortgagee had received from the rents, &c., or might have received, without wilful neglect in her. It appeared that the premises (malt house, etc.,) had been allowed to fall so much out of repair that the rent fell from £22 to £18. Plaintiff had done some repairs and had held 40 years.

Graham & Stanley argued that the mortgagee in possession, being only a trustee till foreclosure, is bound to keep the premises in the same repair as if he was owner; 2 *Vern.* 392; 3 *Atk.* 518; and that the diminution in value should have been charged on the plaintiff, as she might have received the difference if she had repaired.

BY THE COURT: The mortgagee has done some repairs; and, as the only proof of these repairs being insufficient is the diminution in value, we must confirm the report; for it cannot be supposed that, after 40 years possession, the mortgagee is bound to leave the premises in as good condition as he found them.

WRAGG v. DENHAM, 2 *Y. & Coll.* 117 (1836). On a bill for redemption the mortgagee was charged with bad husbandry and non-repair of the mortgaged premises.

ALDERSON, B.:—

7 Then comes the important question, whether I ought to charge the defendants with the deterioration in the value of the premises since the period when Clarke took possession. It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in *Anstruther*. There, the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the meantime in the ordinary way. I think, also, that a mortgagee ought not to be charged

* "So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principle of his mortgage, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction." *Per Lord Ch. Hardwicke, in Farrant v. Lovel*, 3 *Atk.*, 723. (1750.)

exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of showing fraud in the mortgagee; gross negligence is sufficient. The question, therefore, is whether the fact of gross negligence is sufficiently established in this case to enable me to direct the inquiry asked for by the plaintiff. Upon that point I should like to look more minutely into the evidence, because if the Master be directed to make that inquiry, there would be considerable additional expense. If upon examination of the evidence I should come to the conclusion that *prima facie* case of gross negligence is made out, I must direct the inquiry. If, on the other hand, I should be of opinion that there is not sufficient evidence of that fact, of course the principle of law will not apply.

On the following day His Lordship said that he had looked through the evidence, and upon the whole he thought he ought to direct an inquiry as to whether the deterioration in the value of the premises had arisen from the gross negligence in the mortgagees for want of proper repairs and proper cultivation.

Decree accordingly.

DEXTER v. ARNOLD, 2 Sumner, 108 (1834). Bill in equity to redeem a mortgaged estate. The opinion of the court, per STORY, J., is in part as follows:

The fourth exception is on account of the Master's having made a deduction of the supposed rent, upon the ground that the premises were out of repair, and partly untenable, while in possession of the mortgagee and his representatives. The argument seems to proceed upon the ground that the mortgagee was bound to keep the premises in good repair; and therefore ought to be accountable for such rents, as might have obtained if he had done his duty in regard to repairs. We know of no universal duty of a mortgagee to make all sorts of repairs upon the mortgaged premises while in his possession. He is bound to make reasonable and necessary repairs. But what are reasonable and necessary repairs must depend upon the particular circumstances of the case. If a house is very old and dilapidated, he is not bound to go to extraordinary expenses to put it into full repair, if those expenses will be greatly disproportionate to the value of the estate, or to his own interest therein. Certainly it cannot be pretended that he is bound to make new advances on the estate. In *Godfrey v. Watson* (3 Atk., 518), Lord Hardwicke said, that a mortgagee in possession is not obliged to lay out money further than to keep the estate in necessary repair. In *Russell v. Smith* (1 Anst., R., 96), it was decided that a mortgagee, after long possession, was not bound to leave the premises in as good a condition as he found them. The fact, also, that there has been a diminution of the value of the rents was there declared not to be sufficient proof of a want of proper repairs. It is quite a different question

whether, if the mortgagee lays out money in proper permanent repairs for the benefit of the estate, he may not be allowed to claim an allowance therefor. That is a point dependent upon other considerations. But where a mortgagee is guilty of wilful default or gross neglect as to repairs, he is properly responsible for the loss and damage occasioned thereby. That was the doctrine asserted in *Hughes v. Williams* (12 Ves., 495). And there is the stronger reason for this doctrine, because it is also the default of the mortgagor himself, if he does not take care to have suitable repairs made to preserve his own property. In the present case, however, the point does not arise, for there is no evidence in the Master's report which establishes any fact of wilful default or gross negligence in the mortgagee.

These remarks dispose also of the fifth exception, which is founded upon the supposed dilapidations of the buildings, while in possession of the mortgagee. There is no proof whatever that these were caused by his wilful default or gross negligence; but they were the silent effects of waste and decay from time.

MOORE v. CABLE.

[1 *Johns, Ch.*, 385—1815.]

Bill for the redemption of a mortgage. On the 26th of February, 1789, William Brown being seised of the premises, lot No. 54, in Smith & Graves's patent, conveyed the same to Joseph Roe, who, for securing the purchase money, reconveyed them to Brown, by mortgage, dated the 27th of February, 1789, and conditioned for the payment of £40, with interest, on the 1st of May, 1790. On the 28th of October, 1794, the mortgage was assigned to the defendant for the consideration of £30, by the brother of Brown, as his attorney. The heirs of Roe, on the 1st of August, 1807, sold and conveyed the premises to the plaintiff, with covenants and warranty.

It appeared that the defendant entered into actual possession of the premises, by his tenants, in 1800, but had, previous to that time, exercised acts of ownership. He continued in possession until 1808, when he, in conjunction with one Corbin, took a lease from the heirs of Roe. Corbin being in as tenant of the defendant, consented to let in the plaintiff with him; and the defendant brought an action of ejectment, and recovered judgment in 1813, and has since continued in possession, and made improvements, by clearing part of the land, and has received the rents and profits. The plaintiff did not know, until the trial of the ejectment in 1813, that the defendant held under a mortgage, and had in 1807 offered to purchase his interest.

THE CHANCELLOR—Two questions are presented by this case:

1. Is the plaintiff entitled to redeem?*
2. The next question is, whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be ad-

* The opinion on this point is omitted.

mitted consistently with established principles. The defendant was, in this case, a volunteer. Instead of calling upon the debtor, or foreclosing the mortgage, he elected to enter upon uncultivated lands, and to exercise acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The English courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt. In *French v. Baron* (2 Atk., 120), the Chancellor would not allow the mortgagee anything more than his principal and interest, though there was a private agreement between the mortgagor and mortgagee for an allowance for the mortgagee's trouble in receiving the rents and profits of the estate. The same thing was repeated in the case of *Godfrey v. Watson* (3 Atk., 517), and Lord Hardwicke there said that a mortgagee in possession was not obliged to lay out money any further than to keep the estate in necessary repair: but if the mortgagee had expended money in supporting the title of the mortgagor when it had been impeached, he would allow it. The same doctrine was maintained in the case of *Bonethon v. Hockmore* (1 Vern., 316), in which it was declared that no allowance was to be made to a mortgagee or trustee for their care and pains in managing the estate.

I shall, accordingly, direct a master to compute the principal and interest due on the mortgage, down to the 1st of January last, and that, in taking the account, he charge the defendant with the net amount of the rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not for improvements in clearing part of the land; and that he report with all convenient speed; all the other questions are in the meantime reserved.

*Decree accordingly.**

"LORD CHANCELLOR (HARDWICKE) said that a mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but if a mortgagee has expended any sum of money in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it shall carry interest.

He also said a mortgagee shall not be allowed for his trouble in receiving the rents of his estate himself, but if an estate lies at such a distance from the place of his residence, as he must have employed a bailiff, if it had been his own, he shall then be allowed such sums as he has paid to a bailiff, to receive the rents of this estate." (*Godfrey v. Watson*, 3 Atk., 517—1717).

* *Accord*, *Moulton v. Cornish*, 61 Hun., 438 (1891).

SHEPARD v. JONES.
[21 *Ch. D.*, 469—1882.]

By an indenture of transfer of mortgage, dated the 31st of January, 1874, the Victoria Brewery and other hereditaments at Wrexham were conveyed to the defendant, Edward Jones, for securing £2,000, subject to redemption by Thomas Manby. By subsequent deeds further sums of money were charged on the same premises.

On the 10th of October, 1878, Thomas Manby was adjudicated bankrupt, and the plaintiffs, H. Shepard and H. Davies, were appointed trustees of his estate.

On the 18th of February, 1879, the defendant offered the mortgaged property for sale by auction under the power of sale in his mortgage, but no bidding was made for it. Several persons also inspected the brewery with a view of purchasing it by private contract, but declined to do so, alleging as their objection to it the inadequate supply and inferior quality of the water in the well on the premises.

In August, 1879, the defendant took possession of the brewery, which was then vacant, and placed a person in it to take care of it, but did not himself occupy it.

In the early part of the year 1880 the defendant commenced boring operations to deepen the well, and eventually obtained a good supply of water. The defendant alleged that this was done with the knowledge and acquiescence of the plaintiffs.

On the 12th of May, 1880, the defendant again put up the mortgaged premises for sale by auction, when it was bought by David Johnson for £5,000, one of the conditions being that the sale should be completed on the 29th of September following. At that time the principal sum of £4,000 and a considerable arrear of interest was due to the defendant.

The defendant let the purchaser into possession of the brewery soon after the sale, without requiring any rent from him, but the purchase was not completed nor the purchase money paid on the 29th of September.

The purchaser was not a brewer, but a manufacturer of zoedone, and used the premises after taking possession as a storehouse for his goods.

The defendant tendered to the trustees £509 18s. 4d., which he considered to be the balance due to them, but they declined to accept it. They claimed in addition rent for use and occupation from the time when the defendant took possession till the 29th of September, 1880, and they also refused to allow the expense to which the defendant had been put to in deepening the well, amounting to about £83.

The plaintiffs then brought this action against the defendant, claiming the balance of the purchase money, and asking for accounts against the defendant as mortgagee in possession. The defendant paid £544 17s. 2d. into court.

At the trial the above mentioned facts were proved, but there was a conflict of evidence whether the plaintiffs had notice of and acquiesced in the deepening of the well.

JESSEL, *M. R.*

My present opinion is that the appellant is entitled to succeed on both the points in this case. I have always understood that occupation rent is only charged against a mortgagee who occupies*

With regard to the other point, it is one of more general interest. I have always understood the practice to be quite settled. If upon the hearing of a redemption suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence that he has laid out money in lasting improvements—that is, produces evidence of the laying out of the money, and that the works are *prima facie* improvements—that is sufficient for an inquiry. If he proves more—that is, if he not only proves that he has laid out money in permanent works, but they are really improvements and have improved the property to the extent of the money laid out—he will then get not only an inquiry, but an account of the sums laid out in the lasting improvements. But, of course, to get the account he must prove a good deal more than to get an inquiry. Upon that point I will quote some of the words of Lord Langdale in the case of *Sandon v. Hooper*, although *Sandon v. Hooper* went too far on another point, and was varied on appeal; but on this point there has been no appeal. Lord Langdale says this: “Now, in this case it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the court. I quite agreed with the argument that has been used on this occasion, that it was not necessary for the defendant to prove the items of sums of money laid out in permanent improvements alleged to have been made.” Then he goes on: “He may have done something towards the improvement of the estate, and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the court to direct an inquiry upon the subject.” That is, you want general proof of money laid out, and you want general *prima facie* proof that it has been laid out in lasting improvements. That being so, we have only to consider whether there was in this case proof of both those facts. There was not only general proof, but, as I understand, there was detailed proof as to the money laid out. There is no dispute about that. The money laid out was £100; but was it proved generally and *prima facie* to be laid out in lasting improvements? Now it stands in this way: the money was laid out in boring for water. That was not at first productive, and they laid out more money, which was productive, and the quantity of water was largely increased. Whether or not that was an increase which added much to the saleable value of the property would be a matter for inquiry, but they did satisfy the two things laid down by Lord Langdale, namely, that they laid out money, and that the money was *prima facie* a lasting or permanent improvement. It was lasting and permanent, and it was *prima facie*

* The discussion of this point is omitted.

an improvement ; because it very much increased the quantity of the water in the well, whether we look on it as a brewery property or even as a property not used as a brewery, because it appears that a supply from the water company was no longer required. I think there is sufficient for inquiry, even if there were no special circumstances, in this case to distinguish it from the ordinary redemption suit. Of course, a mortgagee takes the inquiry at his own risk, as to what may be the result of the inquiry.

But there are very special circumstances in this case which, I think, distinguish it from an ordinary redemption suit, which puts the right of the mortgagee to the inquiry upon higher grounds. This is not a redemption suit at all. It is a suit brought by the mortgagor for an account from the mortgagee, who has exercised his power of sale of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense which increased its saleable value, I think it is plain on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling price. It seems to me that wherever there is a case of that kind where the mortgagee can prove that the selling price was increased by reason of the outlay, then to the extent to which that selling price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay. Of course the mortgagor could not be made to pay more than the increase ; but to that extent it seems to me in ordinary justice the mortgagee is entitled to say, "You shall not get that increased benefit caused by my outlay without paying for that outlay."

There is another observation I wish to make on the supposed necessity of notice, and there are some words in the judgment of Lord Langdale in *Sandon v. Hooper*, which I have always declined to read literally, and which do not appear to me to be warranted by the judgment of Lord Lyndhurst. That is, as to notice. I am by no means prepared to say that Lord Langdale did not mean exactly what I am going to say ; I rather think he did, but it was imperfectly expressed either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If, on the other hand, it is an unreasonable one, and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession. That being so, it seems to me that the real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agrees to it, then, of course, it is unnecessary for the mortgagee to show that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the

view of a court of law amount to a tacit consent, or, as it is sometimes called, "acquiescence," that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either way.

I think that is the true explanation of what was intended by Lord Langdale in *Sandon v. Hooper*, and I think that is the real view of the law on the subject.

Under these circumstances, I think the appeal must be allowed. As regards the costs there is an ample fund, and you can add the costs to the mortgagee's costs of this suit.*

MICKLES v. DILLAYE.

[17 N. Y., 80—1858.]

Appeal from the Supreme Court. The action was for the redemption of certain premises in the city of Syracuse, mortgaged to Philo D. Mickles. The trial was before a referee, who found that the mortgaged premises were, in 1840, conveyed to Philo D. Mickles by one Fitch. There was then outstanding a mortgage upon the premises, executed by Fitch to David Hall. Philo D. Mickles conveyed to the plaintiff, with warranty, March 8th, 1841, for the price of \$4,000, to secure \$2,000 of which the plaintiff executed the mortgage which in this suit he sought to redeem. This mortgage and the bond collateral thereto were, in April, 1841, assigned by Philo D. Mickles to John Townsend. Philo D. Mickles purchased the Fitch mortgage on September 23d, 1843, and on the 6th of November, 1843, assigned it to John Townsend, without the knowledge or consent of the plaintiff, so far as the evidence showed. Townsend, on the 23d of September, 1846, sold the premises to Charles A. Wheaton for \$1,750, upon a foreclosure of the Fitch mortgage, of which no notice was served on the plaintiff. At the time of this sale, Wheaton was the owner, by assignment from Townsend, of the mortgage for \$2,000, executed by the plaintiff to Philo D. Mickles. Wheaton took possession of the premises, and conveyed the same, with warranty, December 19, 1846, to John A. Robinson, who conveyed, November 19th, 1852, to Henry A. Dillaye, also with warranty. The only question in dispute in this suit was as to the allowance to be made to Dillaye for improvements after he took possession under the deed from Robinson; the effect of the purchase by Philo D. Mickles of the Fitch mortgage being the subject of litigation in another suit.

P. D. Mickles was in possession of the premises at the time he conveyed them to the plaintiff, and when he received the mortgage now sought to be redeemed. From that time until the sale under the attempted foreclosure he continued to rent them in his own name and to receive the rents, without disclosing the interest of the plaintiff. They were assessed to him. Wheaton, the purchaser, went

* In Pennsylvania the cost of permanent improvements "necessary and beneficial for the proper use of the property" will be allowed in an action of "equitable ejectment" brought by a mortgagor against a mortgagee in possession. *Wells v. Tan Duke*, 109 Pa. S. 330.

In Massachusetts, by statute (*Pub. Stat. Ch.* 181 §23).—"All sums expended in reasonable repairs and improvements" are allowed. See *Merriam v. Goss*, 139 Mass. 77 (1885).

into possession immediately after the sale, the tenants of P. D. Mickles, attorning and paying the rent to him. P. D. Mickles, who was examined as a witness, testified that when he heard of the sale, which he supposed was by virtue of the mortgage executed by the plaintiff, he told Wheaton he was very glad of it. He understood that the premises sold for enough to pay the mortgage, and he considered the matter settled, and that Wheaton had obtained a perfect title. The purchasers of the premises under Wheaton took possession at the time of their respective purchases. There was a brick building on the lot, which was erected by P. D. Mickles in 1842 or 1843. It was about nineteen feet wide, thirty-five feet long and two stories high. After Dillaye purchased, and in 1852, it was found that the old building was in a dilapidated condition and was ready to fall down. The walls were badly cracked, particularly the one in the rear. It could have been repaired at an expense of about \$250, by taking down the rear and one of the side walls and rebuilding them. Dillaye caused it to be rebuilt and enlarged, at an expense of about \$5,000, increasing its length to seventy feet, preserving one of the walls and the floors, and making use of the old materials so far as they would answer. He covered it with a tin roof, and put in gas and water pipes. He then rented it in its improved condition.

The referee found the foregoing facts, in substance, and stated that the improvements by Dillaye were permanent and valuable and were made by him in the full belief that he was the absolute owner of the premises.

DENIO, J. The right of the mortgagor who has made default in the payment of the mortgage debt according to his contract, and especially where the mortgagee or his assigns has lawfully acquired the possession, is in equity, and not a strict legal right. It would be impossible for the plaintiff to obtain possession of these premises by any suit or proceeding known to the law, except a suit of equity. When the mortgagor comes into a court of equity in such cases to redeem he must do equity to the mortgagee, or the court will consider the estate absolute in the latter; and the redemption, when allowed, will be decreed either absolutely or under certain conditions, according to the nature and justice of the case. (Powell on Mortgages, 387, 388.) In conformity with this idea of the nature of the equity of redemption, the Court of Chancery has always obliged the mortgagor to submit to equitable conditions. It was formerly held for example that if the mortgagor, after giving the mortgage, had borrowed a further sum of the mortgagee, the latter was not obliged to submit to a redemption until both debts should be paid (*Id.*, 391, 392). The tendency of modern decisions has been to limit and define the power of the mortgagee to insist upon conditions to the redemption. It is by no means intended to state there is any unlimited discretion in courts of equity to compel the owner of an estate bound by a forfeited mortgage to do whatever may in a popular sense and without regard to legal precedents be considered equitable in the particular case. It is, however, useful to bear in mind the origin and true character of the right of redemption

when called upon to determine a case not falling within any settled course of adjudication. It is still the rule that the mortgagor seeking to redeem must do equity to the mortgagee or those who have succeeded to his rights; and where it has not been settled what is equity under the circumstances which attend a given case, the court must determine it according to its own sense of what is morally just and right.

Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements. He can at any time call upon the debtor, by suit or foreclosure, to elect whether he will pay the debt or incur an absolute forfeiture; and if he is found making costly improvements there is good reason to suspect a design to avail himself of the present inability of the debtor to discharge the incumbrance in order to confirm his title to the estate by embarrassing the right of redemption. The general rule is, therefore, understood to be that upon taking the account in a suit for redemption against a mortgagee in possession he is to be charged with the rents and profits, and be allowed only for necessary reparations. (*Moore v. Cable*, 1 John, Ch. R., 387; *Quin v. Brittain*, 1 Hoffman's Ch. R., 353; *Story's Eq.*, Sec. 1016.)

So, if the mortgagor having in fact only a redeemable estate should, even in good faith, deny the mortgagee's equity, this ought not to prejudice the latter, provided he had done nothing to mislead the mortgagor, and had not unreasonably slept upon his rights. In order to apply the cases in which permanent improvements have been allowed to be taken into the account, it is necessary to have a clear view of the situation of these parties at the time the improvements were made. The defendant Dillaye was in possession as owner under a deed with warranty from a person in possession holding a similar evidence of title from one who had purchased the premises at a sale made professedly upon the foreclosure of a mortgage executed by the true source of title, and who had taken possession under that foreclosure.

It is easy to see that an examination, such as a very cautious man would have made, would have shown the invalidity of the foreclosure. But the omission to make an examination was not such gross negligence as to charge the defendant with bad faith. He cannot claim that the estate is irredeemable because he supposed it to be so; but he is not deprived by his omission to examine, of the position of a person acting in good faith without actual notice. The referee has found, what could not be doubted upon the evidence, that he believed himself to be the absolute owner of the lot. But the plaintiff had very materially aided him in coming to this conclusion, or rather, he had suffered him to fall into that error by an unjustifiable breach of his own obligation. His mortgage was executed in March, 1841. One-fourth of the principal and one year's interest were payable in about one year thereafter, and the whole debt was payable on the 1st day of June, 1845. He was in default for a portion of the debt for eleven years, and the whole amount of prin-

principal and interest had been in arrears more than seven years when this suit was commenced. He had not paid the smallest amount, and, so far as appears, had never during that period recognized his indebtedness. Conceding, as we must do upon this case, that the sale by P. D. Mickles to the plaintiff, and the giving back of the bond and the mortgage sought to be redeemed was a real and not a colorable transaction, the plaintiff was in possession, up to the sale upon foreclosure, by P. D. Mickles as his servant or agent or as his tenant. This possession was voluntarily abandoned and given up to Wheaton upon his purchase after foreclosure sale, and the latter immediately entered upon the reception of the rents and profits as owner, and he and those who succeeded him have continued to possess the premises as owners, unchallenged and without actual knowledge of this right of redemption, until shortly before the commencement of this suit, a period of eight years. When Dillave erected the building, he and those who had preceded him in the title under the supposed foreclosure had been in possession as owners about six years. It is not found by the referee that the plaintiff was ignorant that his agent or tenant had been put out of possession upon pretense of the old mortgage, or that Wheaton and his grantees were in possession, claiming as owners under that proceeding; and considering that the premises lie in one of the most considerable interior towns, and upon the great thoroughfare through the State, it is no wise probable that he was ignorant. The referee finds that he was not aware of the improvements while they were going on. This is not inconsistent with a full knowledge that his tenant had yielded up the possession to a party claiming the absolute title, and that the occupants were in possession, believing themselves to be the owners. The fact probably is that both parties acted in ignorance of their rights. The old mortgage is claimed to have been extinguished by the operation of a technical rule of law. Had it remained on foot the right to redeem both mortgages would not have been of much, if any, value, until the defendant had improved the premises by the expensive erection which he put upon them. If the plaintiff was not aware of the extinguishment of the old mortgage he would naturally have considered his interest as nominal; and this, I am persuaded, is the explanation of his long inaction. The case, when Dillave erected the building, was this: He really had the title of a mortgagee in possession, but he supposed he was the absolute owner. The plaintiff had in fact an equity of redemption, but he had abandoned the possession to the defendants, who entered as owners; and he had ceased to claim any interest in the lot. He now finds that he has a valuable equity of redemption; and the question is whether he ought to pay for the improvement as a condition to the redemption. It was necessary that Dillave should make expenditures to a considerable amount to render the premises tenantable at all: but he laid out more than was strictly necessary, though not more than would have been judicious had he been, as he supposed he was, the owner.

I am clearly of opinion that the refusal to allow for the erection of the building was erroneous.

The judgment of the Supreme Court should be reversed, as respects the account stated by the referee, and there should be a reference in that court to take an account between the plaintiff and the defendant Dillaye, in which the latter should be allowed for the enhanced value of the premises on account of the improvements made by the defendants. In other respects, the order should direct the usual allowances between mortgagor and mortgagee on a bill of redemption.*

HUGHES v. WILLIAMS.

[12 *Ves. Jr.* 493—1806.]

Exceptions were taken by the Defendant, a mortgagor, to the Master's Report: First that the Master had charged the Plaintiff, a mortgagee, in possession personally, and by a receiver under his appointment, with the rents actually received; whereas he ought to have been charged according to the circumstances in evidence with the improved rents, at which the estates had been since let by the Receiver, appointed by the Court, and which ought to have been obtained by the Plaintiff, or his receivers, but for their willful neglect or detail.

Another exception was that the Master had allowed the Plaintiff the sum £68 for the expense of opening a slate quarry, the Defendant contending that it was an illegal and improper act and the only benefit accruing to the estate thereby being the sum of £2, charged to the Plaintiff's account as the produce of the slates.

The Defendant was out of possession long before the Plaintiff entered, prior mortgages having been in possession, whom he paid to prevent foreclosure.

The Solicitor-General and Mr. Thomson, in support of the Exceptions; Mr. Richards, Mr. Hart and Mr. Owen for the Report.

THE LORD CHANCELLOR:

I do not mean to say that, to charge a mortgagee in possession, actual fraud is necessary. It is sufficient, if there is plain, obvious and gross negligence, by not making use of facts within his knowledge, so as to give the mortgagor the full benefit, that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was under-let, takes a new tenant another person offering more, an offer, however, not to be accepted rashly. But this case does not furnish even that ground; for, with the exception of a proposition to give £7 a year for one tenement, instead of £5 a year, the rent then paid, there is no proof at any proposal for an increase. A reason also is assigned for not accepting the proposal in that instance; that the tenant was in arrear, and the plaintiff

* "When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of equity."—Per *Grover, J.*, in *Miner v. Beckman*, 50 N. Y. 238, 345 (1872).

Compare *Hubbell v. Moulson*, 53 N. Y. 225; supra p. 132, and *Foley v. Foley*, 15 App. Div. 276 (1897).

was apprehensive of losing that arrear; and there is more difficulty where the estate consists of a number of distinct tenements

Another circumstance that weighs with me is that the mortgagor, if he knows the estate is under-let, ought to give notice to the mortgagee, and to afford his advice and aid, for the purpose of making the estate as productive as possible. If he communicated to the mortgagee plans of improvement in his contemplation, which were disappointed by the embarrassment of his affairs, the court might take a stricter view of the mortgagee's conduct. In this instance, not only such notice was not given, but during the whole period of sixteen years, while the mortgagor was out of possession, he never stated that the estate was not managed as it might be. Can the mortgagor lie by, not giving notice that a greater rent may be made, and come afterwards, by way of penal inquiry, to charge the mortgagee with the effect of his own negligence? I agree to the principle, that has been stated by the Solicitor-General, that it would be dangerous to say the mortgagee is not answerable except for fraud, and would contradict many decrees. If such gross negligence can be shown, as comes up to the description of wilful default, he ought to be answerable for it.

But I determine this exception upon the principle that a mortgagee, taking possession, is to take the fair rents and profits, and is not bound to engage in adventures and speculations for the benefit of the mortgagor; but is liable only for wilful default, of which in this instance there is no pretense. this mortgagor not having even communicated that he had any contemplation of improvement or proposed tenants. It would be most dangerous to entangle mortgagees in a minute inquiry, whether some person would have given more, which was never communicated.

Upon the same principle upon which I determine the first exception in favour of the mortgagee, I must determine the other exception against him. The principle is the safety of mortgagee. The line cannot be drawn. How can it be ascertained that the mortgagor will want a slate quarry. The amount is in this instance inconsiderable, but the principle would reach the case of a mine. The mortgagee, therefore, having engaged in this speculation, must speculate at his own hazard.

The first exception was overruled and the second was allowed.

PARKINSON v. HANBURY, L. R. 2 H. L. 1 (1867). Bill of account charging defendants as mortgagees in possession. Defendants offered to account as agents, having purchased the property, supposing themselves to have a good title. The opinion of LORD CRAWFORTH, in the House of Lords, was in part as follows:

Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the Royal Oak public house ought to have been directed, charging the defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the respondents with being in receipt as mortgagees upon two grounds. That which was

insisted upon mainly was this: That their title, which they acquired under Chambers on the 9th of October, 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of Chambers, and Chambers was merely a mortgagee.

I think that it is perfectly clear law that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear or very distinctly laid down in the cases, but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule. Whether it would be correct to say that, under those circumstances, a person who entered into possession, not as a mortgagee, may not afterwards become mortgagee in possession, with all the liabilities of a mortgagee in possession, is a proposition which need not be laid down now. It is possible that, by distinct circumstances, it may be shewn that there was an intention to alter the character from the one to the other. But nothing of the sort appears here, and it is perfectly clear that, although these respondents were properly treated as parties who had not a valid title as purchasers, because there was nobody who would give a consent to the sale on behalf of the representatives of Parkinson, yet they treated themselves as purchasers, having a valid title and supposed that they were in possession as purchasers, and were, therefore, liable to account only in the ordinary way for the rents.

LORD WESTBURY:

My Lords, I have felt some anxiety in this case, by reason of the form of the decree, to account for the rents and profits, and certainly that is a point which deserves some attention on the part of the House. I take the law to be this. It is undoubtedly settled in the Courts of Equity that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account, not only for what he has received, but for what, without wilful default, he might have received. It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a Court of Equity as the bailiff of the mortgagor. Now, an account against a bailiff was, both at common law and in equity, given with wilful default. This is almost the only case, save in cases of fraud or breach of trust, where wilful default is infused into the form of the account. And if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default.

But if that ground is referred to as the foundation of the practice, it must of necessity follow that the party receiving receives in

the character to which that relation of bailiff and principal may be properly imputed, and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession or to receive the rents as the bailiff of the mortgagor, or that that relation could properly be imputed to him.

Supposing that to be the origin of the rule, it will, therefore, not be applicable to any case where the conclusion of the defendant being in receipt of rent as mortgagee is a conclusion consequential only on your having reduced and set aside some other pretended or alleged title, in respect or by virtue of which he had actually received the rents and profits.

The case here is clearly this: The present respondents claimed the Royal Oak, not in the character of mortgagees, but in the character of purchasers of the property from Thomas Chambers, by virtue of his power of sale. In that capacity they entered and enjoyed, and you have to remove that title by decree before you can fasten on them anything like that state of circumstances which would bring them within the character of mortgagees in possession.

MORRIS v. BUDLONG.
(78 *New York*, 543—1879.)

Plaintiff being greatly embarrassed and her farm about to be sold in foreclosure, defendant agreed to bid it in for the benefit of plaintiff, to purchase various outstanding claims against her and to hold the farm "to secure him for such moneys as he should pay out in carrying into effect this agreement, and give her one year in which to redeem by repaying him the moneys he should pay out in carrying into effect the agreement, and that Mrs. Morris should also pay him all expenses, and for his time and trouble in connection therewith." Budlong thereafter purchased the claim above referred to, took a deed of the Morris farm from the sheriff, and on the 23d day of March, 1860, purchased the premises in question on the foreclosure sale, paying therefor in money and by his bond and mortgage, \$11,290.87. To raise the money for these purposes, Budlong was obliged to go to Wisconsin to get in some investments which he had there, thus incurring expenses, and an absence from home of three or four weeks. That he should do so was agreed upon at the time the above arrangement was made. Immediately after the mortgage sale Budlong entered into possession of the farm, cultivated it, and received the profits thereof, except such portion as was received by the Morris family, until about March 31, 1866. During the first three years that family occupied the whole of the farm house, and during the remainder it was occupied by them, and the family of Budlong. The time for payment by Mrs. Morris under the above agreement expired and was extended one year. The money was not paid, but no further extension was given.

In an action for an accounting it was claimed in behalf of plaintiff, that defendant held the farm as mortgagee in possession and was chargeable not only with the rents and profits actually received by him, but with the full rental value of the farm, which, it was alleged, had not been worked to its fullest capacity.

DANFORTH, J.:—*

Second.—An account rendered upon an application to redeem would properly charge the estate with the money advanced by Budlong and interest, with the expenses and compensation provided for by the agreement, and would credit the estate with whatever had been received from it by sales or rents and profits as incident to the right of redemption, and an equitable offset against the amount due on mortgage, after deducting taxes, repairs and other necessary expenses incurred on account of the estate. (*Ruckman v. Astor*, 9 Paige, 517.) It would include, therefore, the proceeds of timber sold and rents and profits actually received. That the farm was not worked to its fullest capacity furnishes no ground under the circumstances of this case for an enlarged liability. A provident owner might not do that, and there is no fact stated from which the wilful default of Budlong in this respect could be found. Nor has it been. He is in no sense a wrongdoer. He went into possession under the legal title, taken with the knowledge of Mrs. Morris and continued under circumstances which might well have induced a belief that he was in fact the owner of the estate, subject only to an agreement to sell. He was not technically at any time a mortgagee in possession. There was no mortgage. The character is cast upon him by the application of equitable rules to an oral agreement easily susceptible of two constructions, of which the one chosen is in direct contradiction of the written instruments which display his title, and he is, therefore, chargeable only with what he has received and not with what he might have received. "I think," says Lord Cranworth, in *Parkinson v. Hanbury* (2 L. R. (Eng. and Irish App.), 1), "that it is perfectly clear law that where a person comes possessed of a property through erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien upon the property, that does not make him a mortgagee in possession within the meaning of that rule which charges him with wilful default." In 1 Story Eq. Jur. (s 514 a. (10th ed.), it is said: "Where the estate is thrown upon one in the necessary enforcement of his legal rights, or comes to his possession as trustee, he should only be required to act in good faith and to account for what he in fact realizes;" and so in *Moore v. Cable* (1 J. Chv., 384), Chancellor Kent directed the defendant to be charged only with rents and profits received. In *Harper's Appeal* (14 P. F. Smith, 315), it is declared that "whatever the rule on accounting might be, where the party charged was a mortgagee under an ordinary formal mortgage it ought not to be the same, when, by the express agreement of the party seeking equitable relief, he took and held possession as absolute owner." In the case before us

* Only so much of the opinion as relates to the point under examination is given.

there was not only a title taken by the defendant, by the plaintiff's wish, but there is alleged against it only an oral promise to convey at a certain time, upon payment of certain moneys, and no agreement to account in the meantime. There is nothing to show any want of good faith on the part of the defendant in his management of the property, nor that he did not act prudently and according to his best judgment in the matter. The omission of Mrs. Morris to redeem at the end of the time limited, the year or at the end of the second year; her omission to arrange for further time to do so; the continued occupation of the premises by Mr. Budlong, apparently as owner, with no demand for an account of rents and profits, all bear upon this question, and, with the considerations before adverted to, show that the referee erred in measuring the profits for which Mr. Budlong was liable by the rental value of a farm worked to its full capacity rather than by what he actually received.

SIDENBERG v. ELY.
[90 N. Y. 257—1882.]

MILLER, J. This action was brought for the foreclosure of a mortgage made by one William G. Ely, deceased, in 1825, to the Ætna Insurance Company to secure the sum of \$3,000. It contained no clause in reference to taxes and assessments. In 1872 the Ætna Insurance Company assigned the mortgage, together with the bond accompanying the same, to the Excelsior Life Insurance Company. This company paid, while it held the mortgage as assignee, certain taxes, assessments and water rates upon the mortgaged premises, and to redeem the same from tax sales, which together amounted to the sum of \$1,640 or thereabouts. In the year 1875 the Excelsior Life Insurance Company assigned the bond and mortgage, with the whole amount due by reason of the payment for taxes, etc., to the plaintiff, who purchased at the request of the mortgagor and under an agreement to extend the payment of the principal until September, 1878, previous to which time this action was commenced. Subsequent to his purchase the plaintiff paid certain taxes and assessments, amounting to the sum of \$925. At the time of the assignment to the plaintiff the sum of \$934.78 was due for interest. The defendant, Catherine Ely, is the widow and executrix of the mortgagor, who died, leaving a will, by which he devised her the estate for life, with remainder over in fee to the children of his brother James, who are defendants in this action. Upon the trial the court allowed for the taxes, assessments and water rates paid by adding them to the mortgage, which, with the principal and interest found due to the plaintiff, amounted to the sum of \$7,365.70.

The most material question upon this appeal arises in regard to the rights of the plaintiff to the amount of taxes and assessments paid by him and his assignor and to collect the same out of the mortgaged property. The rule seems to be established by abundant authority that, when the owner of mortgaged property refuses or ne-

glects to pay taxes and assessments or liens of a like nature, which are imposed upon the mortgaged premises, the mortgagee has a right to pay the same in order to protect his security, and the amount so paid may be added to and become a part of the mortgage debt, which may be enforced upon a foreclosure of the mortgage.

Willard, in his work on Equity Jurisprudence, at page 446, lays down the rule that taxes paid may be added to the mortgage debt, and he adds: "So money paid by the mortgagee to redeem the premises from a tax sale becomes part of the mortgage debt in equity." He further says, at page 448: "With regard to the amount to be paid on redeeming, it may be said that, as taxes are a legal charge upon the estate, they may, if necessarily paid by the mortgagee, be added to the mortgage debt." The same rule is upheld in *Thomas on Mortgages*, at pages 86 and 276, and in *Jones on Mortgages*, at section 77 and 1134. In the last authority it is laid down that this is so, although there be "no tax clause in the mortgage."

Numerous cases in the reports sustain this doctrine: *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch., 631; *Burr v. Veeder*, 3 Wend., 412; *Brevoort v. Randolph*, 7 How. Pr., 398; *Faure v. Winans*, Hopk. Ch., 283; *Marshall v. Davis*, 78 N. Y., 414; *Robinson v. Ryan*, 25 id., 320; *Williams v. Townsend*, 31 id., 414. These cases are criticised by the counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle that a mortgagee, who, to save his mortgage and to protect his security, is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage. Whether the doctrine of tacking, as claimed by the counsel for the appellants, has any application is not important to consider, if the principles we have stated can be invoked to save the mortgagee from the sacrifice of the property by reason of unpaid taxes or assessments.

In accordance with the authorities already cited, it is not necessary that the premises should be sold prior to the payment of the taxes or assessments before the mortgagee is authorized to pay the same and add the amount paid by him to his mortgage. (See *Eagle Fire Ins. Co. v. Pell*, and *Williams v. Townsend*, *supra*.)

CHAPTER III.
DISCHARGE OF THE OBLIGATION.

(a.) *Tender and Payment.*

Lit., Secs. 334, 335, 339; *supra*, pp. 4, 5, 6.
Co. Lit., 208; *supra*.

EMANUEL COLLEGE v. EWENS.
(1 *Reports in Chancery*, 18.—1625.).

THAT the Earl of Huntington, seised in fee of the Manor of North-Cabury, with advowson appendant, and for payment of debts by way of mortgage, 25 Eliz., made a lease for 500 years of the said manor, with appurtenances, not mentioning the advowson by express name, with a clause of redemption, and for advancement of learning and religion, of his free disposition in 28 Eliz. by deed granted the said advowson to Sir Francis Hastings, and others, and their heirs, to the use of the said Earl for life, remainder to the Master Fellows, &c., of the said college, and their successors, forever; and shortly after in the same year paid his said debts. And this court conceived the said lease, being but a security, and that money paid, the said lease being void, as well against the said college as against any other; and though the money not paid at the day, but afterwards, the said lease ought to be void in equity as well as on a legal payment, it had been void in law against them.

COKER v. BEAVIT.
(1 *Reports in Chancery*, 253.—1625).

The plaintiff hath a decree for the redemption of a mortgage, and the time for the performance is elapsed, of which the defendant would take advantage, the decree being signed and enrolled.

It appearing that this court having very often in such like cases of inevitable necessity, and no wilful default appearing in the party, have enlarged the time as to the performance of decrees, notwithstanding such decrees have been signed and enrolled, and this being also now matter subsequent to the decree; this court declared the plaintiff was capable of relief, and decreed to go to an account.

MANNING v. BURGESS.

(1 *Cases in Chancery*, 29.—1663.)

A MORTGAGE WAS FORFEITED; the mortgagor afterwards meeting the mortgagee, said, "I have moneys; now I will come and redeem the mortgage." The mortgagee said to him, he would hold the mortgaged premises as long as he could; and then when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor went to the mortgagee's house with money more than sufficient to redeem the mortgage, and tendered it there; tender was made to him; and it was decreed a redemption and the defendant to have no interest from the time of the tender, because of his wilfulness.

LUTTON v. RODD.

(2 *Cases in Chancery*, 206.—1675.)

A deed in nature of a mortgage and covenant to reconvey in payment: the money was tendered at the day and place, and refused: Decreed the money without interest from the time of the tender, and to reconvey, though that the plaintiff ought to make oath that the money was kept and no profit made of it.

WILTSHIRE v. SMITH.

[3 *Atkyns* 89—1744.]

A bill was brought to redeem a mortgage on the 8th of May, 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of February, 1741, because the plaintiff had given six months' notice to pay off mortgage, and on that day tendered the principal and interest and a deed of assignment, but the defendant absolutely refused to take the money.

The defendant swears that he offered to take the money, provided he might have time to consider of it and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney whether they were such as he might safely execute.

LORD CHANCELLOR:

There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out, for they are generally attended with circumstances that explain the refusal, and are nothing more than causes cooked up by country attorneys to make themselves business. The plaintiff did not, as he ought to have done, send a draught of the assignment to the defendant any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money or execute the deed of assignment. If this had been the

fact, it would have been unconscionable and unreasonable in the defendant.

But the person who was taken an assignment of the mortgage swears that the defendant desired further time or to that effect.

The question is, Who was in the wrong?

The plaintiff certainly was.

For where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them over; and the plaintiff's attorney ought to have left the deed for a week with the defendant that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or, as I said before, he should have sent a copy or the engrossment of the assignment.

But the subsequent transaction and what passed before the filing of the bill explains it.

Did ever a mortgagor, as is the case here, after he was put under this difficulty, lie by a year and a quarter without bringing a bill to redeem?

What could be the reason?

Why, the plaintiff, the mortgagor's attorney, told him you have made a tender of your mortgage money, and the defendant's refusal has forfeited his interest, for that you may keep the money, and by a bill compel the defendant to take the principal, without interest, from the time of the tender.

LORD HARDWICKE ordered that it be referred to a master to take an account of what was due for principal, in trest and costs on the mortgage, and on the plaintiff's paying the defendant what the Master shall certify to be due within six months after he has made his report, it was decreed the defendant should assign the mortgaged premises, as the Master should direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do stand dismissed.

MAYNARD v. HUNT.
[5 Pick., 240—1827.]

Writ of entry. The demandant declared upon his seisin in fee and in mortgage and a disseisin by the tenant.

The tenant pleaded: First, *null disseisin*.

Secondly, that Nathaniel Maynard, the mortgagor, assigned the premises to the tenant, with warranty against all incumbrances, and that the tenant, after condition broken, but before the action was brought, tendered \$400 for the discharge of the mortgage. The demandant took issue on the tender.

Thirdly, that in consiredation that the tenant would forbear to make the tender, the demandant promised that the tenant should hold the land, discharged of the mortgage, and that he (the demandant) would resort to Nathaniel Maynard for payment of the note, which was secured by the mortgage. Issue was taken on this plea.

Fourthly, a plea like the second, except that it alleged a tender of \$450. Issue was taken on the tender.

The cause was tried before Putnam, J., and a verdict was found for the tenant upon all the issues.

The demandant thereupon moved in arrest of judgment, because the three last issues were immaterial, and the first issue was found only for form's sake and as a consequence of the finding on the other issues.

He further move that if any of these three issues should be adjudged immaterial, the court would grant a new trial, because no evidence had been introduced sufficient or proper to maintain either of them on the part of the tenant, and because all the evidence in the case, the three last pleas and the admission of the tenant's counsel showed that the finding of the first issue for the tenant was a consequence of finding the other issues in his favor, and that if that issue had stood alone, it would have been found for the demandant.

At the trial J. W. Hunt, the brother of the tenant, testified that, at the tenant's request, he called on the demandant and inquired how much was due upon the note. The demandant replied \$400. The witness asked him if he intended to call upon the tenant for the land, if Nathaniel Maynard (who was the defendant's son) should be unable to pay the note. He answered in the affirmative. The witness said he would pay him \$400; that he came for the purpose of settling with him; that he had the money with him in bank bills, and that he would get the specie if it would make any difference. The demandant said it would not. He also said that if he took the money, the tenant would immediately sue Nathaniel. The witness told him that he could expect nothing else. The demandant then said that he would not take the money; he would rather it should lie as it was on interest; he was secure; but he assured the witness that his brother should not be hurt.

The question whether this evidence was sufficient to warrant the finding of the jury was reserved for the determination of the whole court.

PARKER, C. J. It is very clear that all the issues except the first are immaterial, and that the first was found for the defendant against all the evidence in the case which could legally bear upon it. The mortgage deed produced by the demandant entitled him to a verdict on the first issue, there being no payment or tender of payment of the money due, according to the condition, until four years after the condition broken, so that the demandant's title at law was perfect, subject only to be defeated by a process in equity, founded upon payment or tender of payment after condition broken and before foreclosure.

If judgment should be rendered on the verdict in favour of the tenant, the demandant would be entirely deprived of his security and probably of his debt, without any consideration or equivalent, for we cannot consider that the loose conversation testified to by the brother in regard to his claims has proved any intention to give up his security, or that it can have the effect of a release or discharge of the mortgage in law or in equity.

Whether a tender or any fact equivalent was proved is wholly unimportant, as the tenant's right at that time subsisted wholly in equity, and he could not otherwise enforce it than by a bill in equity. The tenant's counsel has reminded us since the argument that no objection was taken at the trial to the time of the supposed tender, and he refers us to the case of *Arms v. Ashley* (4 Pick., 71), to show that it could not afterwards be raised. But the cases are wholly different. In the case cited the point was that a fact capable of proof, but omitted to be proved or called for at the trial, was on the hearing of the questions reserved stated as a ground objection to the verdict. In this case the point on which the cause turns appears on the record and in the proceedings, and, from the tenant's own showing, no other evidence touching it could have been produced had the question been made at the trial, for the tenant's right to tender did not exist until long after the tender could have defeated the demandant's title at law. Admitted that payment tendered and received after condition broken and before foreclosure would be a sufficient defense to an action brought by the mortgagee for possession, it would not follow that a tender not accepted would be. The first might operate as a discharge of the debt and waiver of the breach of the condition, and it might be unreasonable to allow the mortgagee to recover possession, when, by another suit, he would be immediately obliged to surrender it. But the case of a tender is different. The debt is not discharged, and it is only in equity that the mortgagor can avail himself of it.

The proper course in this case is for the plaintiff to recover the conditional judgment, as in the case of mortgage, unless the tenant has a better defence than is shown by the report of the case.

Verdict set aside and new trial granted.

KORTRIGHT v. CADY.*

[21 N. Y. 343—1860.]

Appeal from the Supreme Court. Action to foreclose a mortgage. The defendant, Cady, was a subsequent grantee of the equity of redemption. He averred in his answer and proved on the trial that, after the money secured by the mortgage had become due and the stipulated day for payment had passed, he tendered to the plaintiff the amount due for principal and interest. The plaintiff refused to receive it unless Cady would also pay certain taxes upon the mortgaged premises, which the plaintiff had discharged. It was held that Cady was for reasons unnecessary to be stated, under no obligation to pay the taxes, and the case stood upon the naked tender.

Cady did not, in his answer, allege a readiness still to pay the mortgage debt, or that it was paid into court, nor did he offer to bring it into court; and it did not appear, from the finding of facts or otherwise, that he in any way kept the tender good. The plaintiff had the usual judgment of foreclosure and for a sale of the

* Opinion of Davies, J. and Welles J. (the latter dissenting), and portions of opinion of Chief Justice are omitted. All of the Judges except Welles concurred.

mortgaged premises. Upon appeal by the defendant, Cady, this judgment was affirmed at General Term in the First District, whereupon he appealed to this court.

COMSTOCK, C. J. After the suit was commenced to foreclose the mortgage Cady, who had become the owner of the land, tendered the amount due, with the costs, which, being refused, he set up the tender in his answer in bar of the further maintenance of the action. The only question in the case is whether a tender, made after a mortgage is due by the owner of the lands mortgaged, discharges the lien.

Forty years ago this question was fully determined by the Supreme Court of this State in the case of *Jackson v. Crafts* (18 John., 110.) Mr. Justice Woodworth, in delivering the opinion of the court, observed: "From the nature of the interest the mortgagee has, there is no necessity for reconveyance by him to the mortgagor after the mortgage has been paid. When that is done the mortgagee has no title remaining in him to convey. and consequently, by our laws, on payment of the money, he is not deemed a trustee, holding the legal estate for the benefit of the mortgagor. The only question, then, is whether tender and refusal are equivalent to payment." Having thus truly stated the relation between mortgagor and mortgagee, according to the law as it was then and has been ever since well settled in this State, he cited some of the early English authorities, holding that a tender of the money due discharged the land from the lien.

Such being, as I think, the clear result of the authorities, a renewed discussion of the question may seem to be unnecessary. I cannot help saying, however, that a decision by this court in opposition to the rule laid down in the cases referred to, would introduce into the law of mortgage an inconsistency too plain to escape observation. In the early history of that law, the courts of equity, departing from the letter of the contract, but adhering to the intention of the parties, adopted the just and liberal doctrine that a mortgage was but a pledge of security, always redeemable until foreclosure. The courts of law followed in the same direction. As Lord Redesdale observed (Mitf., 428:) "The distinction between law and equity is never in any country a permanent distinction. Law and equity are in continual progression, and the former is constantly gaining upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Such, pre-eminently, has been the course of jurisprudence on this subject. The doctrines originating in the courts of equity, respecting the rights of mortgagor and mortgagee, have been incorporated into the code of the common law, so that there is now no difference between the two systems. This has been true in substance for nearly a century past. In *Martin v. Mowlin* (2 Burr., 978), decided by the English King's Bench in 1760, it was held that whatever words in a will would carry the money actually due upon a mortgage would carry the interest in the land. Lord Mansfield said: "A mortgage is a charge upon the land, and whatever would give the money would

carry the estate in the land along with it. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to the executor; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt or forgiving it will draw the land after it as a consequence; nay, it would do it, though the debt were forgiven only by parole." So, in *The King v. St. Michaels* (Doug., 632), it was said by the same judge that "a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form has but a chattel, and the mortgage is only a security." To the same effect is *The King v. Eddington* (1 East., 288), and such is the uniform tenor of the English authorities. (See 6 Conn., 159.)

In this State the rules of law and equity in regard to mortgages have never differed in any degree, it being the doctrine of both systems that a mortgage is but a personal interest. This proposition, in its full length and breadth, was determined in *Runyan v. Mersereau* (11 Johns., 534), where the question arose in the most direct manner whether the freehold was in the mortgagor or mortgagee. The plaintiff, deriving title under the mortgagor, sued in trespass for cutting timber, the defendant justifying under a license from the mortgagee. It was held that the action was maintainable, the decision being placed explicitly on the ground that the former was the real owner of the land, while the latter had a chattel interest only. So it has been held in repeated decisions that the mortgagee cannot, in any way, convey, devise, mortgage or incumber the land, while the mortgagor can do all these things: that judgments against a mortgagee, which are a lien on all legal estates, do not affect his interest in the lands mortgaged; that such an interest does not descend to his heirs, but goes to the personal representative as a chose in action; that it is not subject to dower or courtesy; that it passes by a parol transfer, and by any transfer of the debt, and, finally, that it is extinguished by payment, or by whatever extinguishes the debt. (3 Johns., Cas., 329; 1 Jr., 590; 4 id., 42; 7 id., 278; 15 id., 319; 6 id., 290; 2 Paige, 68, 586; 5 Wend., 603; 2 Barb. Ch., 119.)

But it has been said that the mortgagee could maintain ejectment against the mortgagor until our Revised Statutes abolished that remedy in such a case, and that even since those statutes, the mortgagee, being in possession, may retain it until the debt is paid. All this is true, but it presents no anomaly or inconsistency in the law. The Mortgagee's right to bring ejectment, or, being in possession, to defend himself against an ejectment by the mortgagor, is but a right to recover or to retain the possession of the pledge for the purpose of paying the debt. (6 Conn., 163.) Such a right is but the incident of the debt and has no relation to a title or estate in the lands. Any contract for the possession of lands, however transient or limited, will carry the right to recover that possession, and such was deemed to be the nature and construction of a mortgage, it being considered that the parties intended the possession of the thing hypothecated should go with the contract. Ejectment was not, in fact, a real action at the common law. That remedy, in its origin, was only to recover possession according to some temporary

right, and it was only by the use of fictions that the title was at length allowed to be brought into controversy. (3 Bl., 199, 200.) When the Legislature, by express enactment, denied this remedy to mortgagees, they undoubtedly supposed they had swept away the only remaining vestige of the ancient rule of the common law which regarded a mortgage as a conveyance of the freehold; yet I see nothing inconsistent or anomalous in allowing the possession, once acquired for the purpose of satisfying the mortgage debt, to be retained until that purpose is accomplished. When that purpose is attained, the possessory right instantly ceases, and the title is, as before, in the mortgagor, without a reconveyance. The notion that a mortgagee's possession, whether before or after default, enlarges his estate, or in any respect changes the simple relation of debtor and creditor between him and his mortgagee, rests upon no foundation. We may call it a just and lawful possession, like the possession of any other pledge, but when its object is accomplished, it is neither just nor lawful for an instant longer.

There are terms of the ancient law which have come down to us, having long survived the principles of which they were the appropriate expression. Thus the words "law day" once, and very expressively, marked the time when all legal rights were lost and gone by the mortgagor's default. There is now no such time until foreclosure by a judicial sentence or sale under a power. But the term is still in use, serving no other purpose than to engender confusion and uncertainty in minds which derive their conceptions from words rather than things. So we have the terms "redemption" and "equity of redemption," which belong to a system of law which gave the legal estate, defeasibly before default and absolutely afterwards, to the mortgagee, and which, while that system prevailed, were descriptive of the mortgagor's right to go into equity, on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. Even the word "forfeiture," still so often used, is no longer, in reference to this subject, the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts, or by a sale in the manner prescribed by the statute law, if he has himself, in the contract, given authority thus to sell; but, until the foreclosure, his estate, the day after a default, is exactly what it was the day before. Controversies like the present would cease to arise if the mere terms of the law were no longer confounded with its principles.

The proposition that a tender of the money due on a mortgage, made at any time before a foreclosure, discharges the lien is the logical result of premises which are admitted to be true. These are that the mortgagor has the same right after as before a default to pay his debt, and so clear his estate from the incumbrance, and that payment being actually made, the lien thereby becomes extinct. We have, then, only to apply an admitted principle in the law of tender, which is, that tender is equivalent to payment as to all things which

are incidental and accessorial to the debt. The creditor, by refusing to accept, does not forfeit his right to the very thing tendered, but he does lose all collateral benefits or securities. (4 Johns., Cas., 243; 12 J. R., 274; 6 Wend., 22; 6 Cow., 728; Coggs v. Bernard, 2 Lord Ray. R., 916.) Thus, after the tender of a money debt, followed by payment into court, interest and costs cannot be recovered. The instantaneous effect is to discharge any collateral lien as a pledge of goods or the right of distress. It is not denied that the same principle applies to a mortgage, if the tender be made at the very time when the money is due. If the creditor refuses, he justly loses his security. It is impossible to hold otherwise, although the tender be made afterwards, unless we also say that the mortgage, which was before a mere security, becomes a freehold estate by reason of the default. That this is not true has been sufficiently shown.

It is said that mortgagees will be put to great inconvenience if at any period, however distant from the time of maturity, they must know the amount of the debt and accept a tender on peril of losing their security. The force of this argument is not perceived. As a tender must be unqualified by any conditions, there can never be any good reason for not accepting the sum offered, whether it be offered when it is due or afterwards. By accepting the tender the creditor loses nothing and incurs no hazard. If the sum be insufficient, the security remains. It is only by refusing that any inconvenience can possibly arise. But, whatever may be the consequences of refusal, the creditor may justly charge them to his own folly.

The judgment of the Supreme Court must be reversed and a new trial granted.

SHIELDS v. LOZEAR.
[34 N. J. L. 496—1869.]

This was an action of ejectment tried before the Chief Justice at the Warren Circuit (a trial by jury having been waived by the parties), to recover the possession of a tract of land situate in said county. The action was commenced on the 13th of June, 1869, and the plaintiff's right of possession was alleged to have accrued on the 1st day of April, 1869. The plaintiff in error (who was the plaintiff below) produced and offered in evidence a deed of conveyance of the premises, made to him by the defendant and wife, bearing date on the 9th of April, 1867.

The defendant then offered in evidence a mortgage made and executed by the plaintiff on the same premises, bearing date April 1st, 1867, together with the bond mentioned in and secured by said mortgage, conditioned for the payment of the sum of \$4,000 on or before the 1st of April, 1868, with interest from date. The plaintiff then offered in evidence a lease for the same premises, made and executed by him to the defendant, bearing date on the 9th day of April, 1867, for a term ending on the 1st day of April, 1868, in and by which said lease the defendant covenanted to quit and surrender up the premises to the plaintiff at the expiration of the said term, and proved

that the rent agreed on was the interest of the mortgage money, and taxes and water rates. It was also proved and found as a fact in the cause, that a legal tender of the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the first day of April, 1868, and before the commencement of this action, which tender the defendant refused to accept.

The plaintiff asked the court to find, as a fact, that a legal tender of all the money due and owing on the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action, and, upon that fact, to give judgment for the plaintiff, on the ground that said tender extinguished and terminated any and all right the said defendant might have previously had to hold possession of the said land, by virtue of said mortgage. And the plaintiff, by his counsel, also asked the court, in case the plaintiff should be in error as to his asking in regard to the effect of the said lease, to permit an amendment of the declaration to be made, so as to state that the plaintiff's right to the possession accrued at the time when the said tender was made.

The court did find, as a fact, that a legal tender of all the money due upon the said bond and mortgage was made by the plaintiff to the defendant after the 1st day of April, 1868, and before the commencement of this action; but the court refused to adjudge that said tender extinguished and terminated the right of the said defendant to hold possession of the said land, by virtue of said mortgage, and did adjudge that said tender having been made after the day named in the said bond for the payment thereof, did not extinguish or terminate the right of the said defendant to hold possession of said land, by virtue of said mortgage, notwithstanding the making of said tender, to which refusal and judgment of the court the plaintiff, by his counsel, excepted, and he prayed that his exception might be sealed, and it is sealed accordingly.

The opinion of the court was delivered by

DEPUE, J. The bills of exception sealed at the trial raise two questions: First. Whether the defendant, being the tenant of premises under the plaintiff, could, at the expiration of his lease, make title under his mortgage without first yielding and surrendering the possession to the plaintiff.* And, second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.

The extinguishment of the lien of the mortgage, by the unaccepted tender of the mortgage money after the day named in the condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condi-

* The opinion on this point is omitted.

tion, and in a court of law was treated as subject to be defated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any re-conveyance, by the simple operation of the condition. A tender at the time and place and in the manner prescribed in the instrument itself, was equivalent to performance, and operated to determine the estate of the mortgagee, and re-vest it in the mortgagor. Lit., § 335; Co. Lit. 207, a.; 4 Kent, 193; Coote on Mortgages 6; Merritt v. Lambert, 7 Paige 344. But when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a re-conveyance was necessary to restore him to his original estate. Lit., No. 332; 2 Black. Com. 158; Coote on Mortgages 9. So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer, that if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. Williams on Real Prop. 333. The rigor of this rule was somewhat abated by the statute of 7 George II., ch. 20 (1 Evans' Statutes 243, re-enacted in this State December 3d, 1794, Nix. Dig., 4th ed., 608), which permitted a mortgagor, when an action was brought on the bond or ejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or in case of a refusal to accept the same, to bring such money into court where such action was pending which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or re-convey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute, the English courts of law have exercised an equitable jurisdiction, to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a re-conveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law, a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a re-conveyance on equitable terms.

In the United States, the prevailing doctrine in courts of law, as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. 2 Greenl. Cruise 91; note 1; 4 Kent 193. In fact, the latter conclusion will necessarily follow, whenever the mortgage is regarded not as a common law con-

veyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for debt. Per Chief Justice Green in *Osborne v. Tunis*, 1 Dutcher 651; per Justice Southard, in *Montgomery v. Bruere*, 1 South. 279, whose dissenting opinion in the Supreme Court was adopted in the Court of Errors in reversing the judgment of the Supreme Court. 2 South. 865. Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice Kinsey, speaking of payment after the law-day, says: "When the debt is discharged according to law the mortgagee has the legal seisin in trust for the mortgagor, and the court will never permit the trustee of those claiming under him to set up this legal estate in him or them, to defeat the possession of the cestui que trust. This principle is settled in *Armstrong v. Peirse*, 3 Burr, 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the cestui que trust could have compelled a re-conveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7th, 1799 (Rev. Laws 463; Nix. Dig., 4th ed., 611, § 11), which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance, where the question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named as performance of the condition, and by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 J. R. 110, on a misapprehension of a passage from *Littleton. Lit.*, § 335, 338. It was denied by the Chancellor in *Merritt v. Lambert*, 7 Paige 344, and re-affirmed in the Supreme Court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the Court of Errors, in the same case on error, 26 Wend. 541; and by the Supreme Court in *Arnot v. Post*, 6 Hill 65; and again denied by the Court of Errors in reversing the last mentioned case. *Post v. Arnot*, 2 Denio 344. Finally, in *Kortright v. Cadv*, 21 N. Y. 343, the question was set at rest in the courts of that state by reaffirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that state that a tender of the money due upon a mortgage at any time before foreclosure, discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other state. In Massachusetts the decisions have been to the contrary. *Maynard v. Hunt*, 5 Pick., 240; *Currier v.*

Gale, 9 Allen 552. In an early case in New Hampshire (Swett v. Horn, 1 New Hamp., 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, &c., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. Bailey v. Metcalf, 6 New Hamp., 156.) It may with safety be said that the doctrine of the New York courts originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that state, is without the support of any judicial tribunal in this country; and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named determinates the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default, only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money bond, before the statute 4 Anne, Ch. 16, Sec. 12, re-enacted in this state (Nix. Dig., 631, Sec. 9), payment after the day would not be pleaded without an acquittance by deed. (2 Saund., 48, c, note 1; Rosenerantz v. Durling, 5 Dutcher, 191.) The statute only applies to payments actually made, and a tender after the day cannot be pleaded. (2 Saund., 48, b, note i.) And if the tender is made on the day, it can only be made available by plea, accompanied by payment into court. (Co. Lit., 207, a.)

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which by the rules of pleading and established principles of law, the court must deny, in an action on the bond, which is the immediate evidence of the debt. If the form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy of a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the

question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. (6 Bac. Abr., 456, title Tender, &c., F.) If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed, and the offer may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. (Co. Lit., 209, a.) The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this, courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee, with all the rights incident to it. (*Grugeon v. Gerrard*, 4 Younge & Coll., Exch., 119-128.)

When a court of law undertakes to deal with this equitable estate, it must do so upon the principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seizin of the mortgagee is not a mere formal title, and no trust will be raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

It was stated on the argument that the money due on the mortgage was brought into court at the trial. The fact does not appear in the bills of exceptions. It is not necessary, therefore, to decide whether a court of law could enforce redemption in cases within the equity, though not within the strict letter of the statute. The English courts of law have given a strict construction to the corresponding statute of 7 George II., Ch. 20, and have held the circumstances of the litigation mentioned in the preamble and in the statute to be jurisdictional facts, which the court is not at liberty to disregard. (*Doe v. Clifton*, 4 Ad. & El., 809; *Good-title v. No-title*, 11 Moore, 491; *Sutton v. Rawlings*, 3 Exch., 407.) The statute should be strictly construed, and is not applicable to any case in which the mortgagor is himself the actor. It was designed to apply only in certain cases mentioned in its preamble and in the introductory

words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgage has obtained under the mortgage. (*Yates v. Humbly*, 2 Atk., 363; *Green v. Green*, 2 Simons, 399, 406; *Bacon's Ordinances in Chancery*, 9; *Valentine v. Teller*, Hopk. C. R., 422; *Devancene v. Devancene*, 1 Edw. C. R., 272; *Kershaw v. Thompson*, 4 Johns. C. R., 609; *Schenck v. Conover*, 2 Beas., 221; *Fackler v. Worth*, *Ib.*, 395; *Thomas v. DeBaum*, 1 McCarter, 37; 2 Dan. Chan. Prac., 1280.)

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to the courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

TUTHILL v. MORRIS.
[81 N. Y. 94—1880.]

Appeal from judgment of the General Term of the Supreme Court, in the Second Judicial Department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to restrain the defendant from selling certain premises in statutory proceedings to foreclose two mortgages thereon and to have the same adjudged to be extinguished and to require defendant to cancel the same of record, on the ground that the amount of the mortgage was duly tendered and refused.

The mortgages were executed by plaintiff. The mortgagees commenced proceedings to foreclose the same by advertisement under the statute. Pending the proceedings they assigned the mortgages to defendant. Defendant requested one Steers, an attorney, to attend the sale for him. The circumstances and the nature of the employment, together with the occurrences out of which the alleged cause of action accrued, are set forth in the opinion.

RAPALLO, J. The uncontroverted evidence shows that Mr. Steers, to whom the tender relied upon by the plaintiff was made, was not the attorney in the foreclosure proceedings nor connected with such attorney, nor the agent of Mr. Morris, except for the specific purpose for which he was employed; that his first and only connection with Mr. Morris or the foreclosure was that he was requested, on behalf of Mr. Morris, to go to the place of sale and engage an auctioneer, and to attend the sale and see that it was properly conducted. It may also be inferred from the testimony that he was instructed that the sale should be for cash. It is conceded by the

respondent's points that Mr. Steers had no express authority to receive a tender and that none was thought of. Mr. Steers did not know nor was he informed of the amount due for principal, interest or costs, beyond such information as was afforded by the notice of sale, nor does it appear that he had any means of ascertaining the amount of the costs. He was not empowered to receive the purchase money, for this would be payable only on the execution of the deed of mortgage. When he arrived at the place appointed for the sale he was presented with a summons, complaint and order of injunction in an action by the plaintiff against Mr. Morris, but declined to receive or admit service thereof on behalf of Mr. Morris, on the ground that he was not his attorney. The injunction order was then read to him. It ordered that the sale be upon the terms, among others, that not more than 10 per cent. of the amount bid be paid down. He stated, as testified to by the plaintiff's attorney, that he was instructed to sell for cash, and said that if he could not do that, he should adjourn the sale, and accordingly instructed the auctioneer to adjourn the sale for thirty days. After he had announced his intention to adjourn the sale, but before he had instructed the auctioneer and as he was about doing so, the alleged tender was made by Mr. Tuthill, one of the plaintiff's attorneys, in the following manner, as testified to by Mr. Tuthill: Mr. Tuthill testifies that he tendered to Mr. Steers a quantity of greenbacks, amounting, in fact, to \$6,300, and said to Mr. Steers that he tendered the money in behalf of the plaintiff for the whole amount due. That he did not state how much money there was, but tendered it, and said to Mr. Steers: "I want to pay the whole amount if you will let me know how much it is," and Steers replied that he did not know. Witness then said: "Will you take this money?" and he said he would not, and asked what witness wanted to pay for, and witness said that he wanted to pay for the notes, interest and costs. Immediately after this conversation the auctioneer, under the instruction of Mr. Steers, announced the adjournment of the sale for thirty days.

Mr. Steers testified that in declining to receive the money he stated that he was not authorized and that the sale was adjourned.

We perceive nothing the course pursued by Mr. Steers indicating any purpose to oppress or take any undue advantage of the plaintiff. By the adjournment of the sale the plaintiff was relieved of all immediate pressure, and ample time was afforded, if he, in good faith, decided to pay off the mortgages, to seek the proper party and have the amount of interest and costs ascertained. It is apparent that the tender made was a complete surprise, and that even if Mr. Steers had authority to receive payment of the mortgages, he was not in a situation to do so at that time or place. It is by no means clear that a person, not the attorney in the proceeding, but merely casually employed to superintend a mortgage sale and see that it is properly conducted, is by such employment authorized to receive the principal of the mortgage; but, irrespective of that point, when he announces that he is ignorant of the amount due for principal, interest and costs, and it is evident that he has not the means of in-

formation at hand as to the exact amount, it would be in the highest degree unreasonable to hold that a person thus situated is bound to take the responsibility of accepting or refusing a tender, and that his refusal discharges the lien of the mortgage. Insisting upon the immediate acceptance of a tender under such circumstances, and when the sale is about to be adjourned, indicates rather a design on the part of the mortgagor to take an unfair advantage of the mortgagee than to relieve himself from oppression.

Furthermore, there is no evidence in the case showing that the sum tendered was the full amount of principal, interest and costs. The sum tendered is said to have been \$6,300. The amount of principal and interest, according to the notice of sale, was \$6,150 and upwards. What was the amount of the costs in no manner appears in the case. To the point it is answered that Mr. Steers did not object that the amount tendered was insufficient, and that the plaintiff was ready to pay whatever amount was due. But Mr. Steers did state that he was ignorant of the amount, and he did not occupy such a relation to the case that it could be presumed that he knew or that it was his duty to know the precise amount.

Neither does it appear that any specific amount was tendered. The plaintiff's witness, Mr. Tuthill, exhibited a quantity of bills, but he admits that he did not name the amount, though he asked Mr. Steers to count them, and, taking the whole evidence, it is not clear that Mr. Tuthill offered to pay the whole amount he had in his hand, if it exceeded the amount due. When asked what he wanted to pay, he replied, "the notes, interest and costs." He had previously said that he wanted to pay the whole amount if Mr. Steers would let him know how much it was, and Steers had told him that he did not know. The fair construction of this testimony is that he desired to pay the amount due only, and, before paying, desired to be informed of the amount, but that the person to whom the person applied had not the means of giving the information.

We are of opinion that the plaintiff failed to make out a tender to the defendant and a refusal which discharged the lien of the mortgage. In view of the serious consequences resulting from the refusal of such a tender, the proof should be very clear that it was fairly made and deliberately and intentionally refused by the mortgagee, or some one fully authorized by him, and that sufficient opportunity was afforded to ascertain the amount due. At all events, it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due. The burden of that proof is on the party alleging the tender.

But even if a sufficient tender had been made out, this action could not, in our judgment, be maintained. Although the authorities cited sustain the proposition that when a tender has been duly made of the full amount due it will discharge the lien and be a good defense against its enforcement, without the tender being kept good, yet we are clearly of opinion that it should be kept good in order to entitle the mortgagor to the affirmative relief which he seeks in this action and which the judgment awards him, viz., the extinguishment of the mortgage. A party coming into equity for affirmative relief

must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt it must rest on strict legal rather than on equitable principles. The circumstances that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon. Even securities void for usury would not be cancelled by a court of equity, without payment of the debt with legal interest, until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but on the contrary recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage.

We are of opinion, however, as already stated, that no sufficient tender was shown, and that on both grounds the judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

NELSON v. LODER.
[132 N. Y. 288—1892.]

This was an action to compel the assignment of a bond and mortgage and to restrain defendant from prosecuting an action to foreclose the same.

On the 18th of October, 1880, Thomas Nelson called on Sarah E. Loder, exhibited to her his mortgage, and tendered to her a sum sufficient to pay the amount due on her mortgage, with costs of the foreclosure then accrued, and demanded that she assign her bond and mortgage to him, which she refused to do. The tender was not kept good, but the money was deposited by the plaintiff in his general account in a bank.

FOLLET, CH. J. Whether the defendant is entitled to interest on the debt secured by her bond and mortgage to the date when she shall be paid by the plaintiff, or only to October 18, 1880, the date of the tender, is the only question involved in this appeal. In case the whole amount secured by a mortgage is due, the tender of the sum unpaid by the owner of the mortgaged premises extinguishes the lien of the mortgage, though the tender is not kept good, but it does not discharge the promise or covenant to pay the debt for which the debtor remains liable. (*Kortright v. Cady*, 21 N. Y.

343; *Werner v. Tuch*, 127 id. 217; *Mitchell v. Roberts*, 17 Fed. Rep. 776, 783; *Haynes v. Thom*, 28 N. H. 386, 400; *Chitty on Contracts* (12th ed.), 787; *Jones Mort.* 886.)

If a debtor wishes to extinguish his liability for subsequently accruing interest, or demands some affirmative relief, he cannot retain the money, subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time. He must keep his tender good. (*Tut-hill v. Morris*, 81 N. Y. 94, 100; *Harris v. Jex*, 55 id. 421, 425; *Gyles v. Hall*, 2 P. Wms. 378; *Bishop v. Church*, 2 Ves., Sr. 371; *Garforth v. Bradley*, 2 id. 675; *Stow v. Russell*, 36 Ill. 18; *Jones on Mort.*, § 892; *Thomas on Mort.*, 399; *Coote on Mort.*, 4th ed., 885.)

A subsequent lienor's right to redeem a prior security is derived from the owner of the mortgaged premises, and he is in this respect in no better position than the owner, and his tender, if he wishes to stop interest or compel an assignment of the prior lien, must be as absolute and specific as that which the owner is required to make as a ground for affirmative relief or to stop the running of interest.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

CHAMPNEY v. COOPE.
(32 *New York*, 543.—1865.)

Action to foreclose a mortgage for \$5,000, made by Jane Coope to Lime T. James, on a farm in Ulster County. The money for which the mortgage was given was borrowed for the benefit of David Coope, the son of the mortgagor, who agreed to pay the debt. He paid the debt in instalments extending over several years. In the meantime he borrowed various amounts from the plaintiff's intestate, at the same time promising that when the mortgage debt to James was paid the mortgage should be assigned to her as security for such loans. This was subsequently done.

DAVIES, J. The primary debtor upon the bond and mortgage was Jane Coope, and in the first instance it was her debt to pay. David Coope was her surety, and not the original debtor. The payments made on account of the bond and mortgage, by David Coope, were all made after the death of Jane Coope, and it does not appear that they were made by him as her agent, or with her funds, and in support of the judgment, we may infer, if such inference is necessary to sustain the judgment, the negative of these two propositions whatever may be the equities between David Coope and Jane Coope, it is unnecessary to inquire or pass upon. No notice of those equities was communicated to Miss Jacobs, and she took the mortgage direct from the original mortgagee, and it is not alleged that any equities existed as between the original parties to the mortgage, which impairs its validity, independent of the payments made by David Coope. It is found as a matter of fact in the primary tribunal, and such finding is conclusive upon the court (the judgment therein not having been reversed upon

a question of fact) that such payment was made, with the intent not to satisfy or extinguish said bond and mortgage, but with the intent of keeping the same alive and outstanding, and of transferring them to the plaintiff as valid and subsisting securities.

If, therefore, it be assumed that this payment was made by Jane Coope, or by David Coope as her agent, if made with this intent, no merger took place, even though the bond and mortgage had been reassigned to her, and by her assigned to the plaintiff's intestate. These propositions are abundantly sustained by authority. (*James v. Morey*, 2 Cowen, 246; *Davis v. Chamberlain*, decided in this court in June, 1860.) In the latter case a mortgage had been given by one individual banker to the comptroller, to secure circulating notes. A deposit was made by the banker with the bank department, sufficient to meet the amount of the outstanding notes, and the banker having negotiated a transfer of the bond and mortgage to the Bank of the Capitol of the city of Albany, the bank department reassigned the bond and mortgage to the individual banker, and he then assigned it to the Bank of the Capitol, which assigned it to the plaintiff in that action; and in a suit to foreclose the mortgage, the court found that it was not the intent of the parties, by the payment to the bank department and the reassignment to the original mortgagor, to extinguish and satisfy the bond and mortgage, but to keep them alive as valid and subsisting securities, and this court affirmed the judgment of Supreme Court, which held that no merger had taken place, and that the securities remained valid and unaffected by the payment to the bank department of the amount for which it held them, and the reassignment to the original mortgagor. I am unable to see why the doctrine of that case is not decisive of the one now under consideration.

But in this case there never was an union of the equitable and legal estate, there never was a confusion of rights, where the debtor and creditor became the same person. And even if there had been equity would preserve the rights distinct, according to the intent as found in this action. The principle is very clearly stated in *Mickles v. Townsend* (18 N. Y., 582), by Denio, Ch. J. He held the doctrine of merger was inapplicable to that case. Merger, he said, in its relation to real estate, occurs when the legal and equitable estate are united. In such cases the equitable estate is merged in the legal title, and is extinguished at law, and generally in equity also, by the unity of seizin. But in that case there was no unity of the equity of redemption, and of the estate mortgaged in *Philo. D. Mickles*. He had parted with the equity of redemption long before he purchased the mortgage. He had also before that time assigned the mortgage of the equity of redemption, which he took back when he conveyed to the plaintiff, so there was nothing upon which to predicate the idea of merger. But if this were otherwise, and if P. D. Mickles had retained the equity of redemption until he had purchased the mortgage, it would, in the view of a court of equity, depend upon his intention when he did the latter act, whether the mortgage should be considered extinguished. By taking an assignment from Hall instead of a satisfaction, and especially by selling

and assigning the mortgage to Townsend for a valuable consideration as an existing security he sufficiently manifested an intention not to extinguish it. In the case now at bar, we have all these indicia, which were regarded as so conclusive. We have in the first place the finding of facts, that David Coope, by the payment made, did not intend to satisfy or extinguish the bond and mortgage, but meant to keep them alive as valid and subsisting securities, and this intention is confirmed and rendered unquestionable by his taking the assignment of the bond and mortgage in blank, instead of a satisfaction, and especially by selling and assigning the bond and mortgage to the plaintiff's intestate for a valuable consideration.

But we have seen that the doctrine is well settled by authority, in relation to mortgages; that if the amount due thereon is paid, the intent of the parties in making such payment, whether to extinguish or keep alive the security, will govern. The Supreme Court throws in another qualification, and which it doubtless thought material if not controlling, viz.: that if the money is applied upon the instrument, though with the intent to have it subsequently assigned and continued as a valid security, such intent was held to be unavailing. It is apparent from this, that the Supreme Court supposed, that in the present case, the payments made had been applied on the instruments, the bond and mortgage. No such fact is found by the referee, and by reference to the indorsements made on the bond, as set out in the case, it is seen that they are only indorsements of interest paid, and that no payment on account of principal had been applied on the instruments. Such omission is a striking confirmation of the finding of the referee, that in making the payment it was not intended to satisfy or extinguish the amount due upon the bond and mortgage, in whole or in part.

I arrive at the conclusion, therefore, that this bond and mortgage continued valid and subsisting securities, and that the plaintiff's intestate could rightfully collect the amount due thereon.

BARNES v. MOTT.
(64 N. Y., 397.—1876.)

Action to restrain the sale upon execution of certain premises in the city of New York owned by plaintiff, Henry M. Barnes, and to have the lien of the judgment upon said premises discharged; also to restore the lien of a mortgage upon said premises alleged to have been satisfied by mistake.

The judgment in question was obtained by one Orchard against defendant Britton and one Binninger on the 2d day of February, 1864. At that time Britton was the owner of the premises referred to, which were subject to a mortgage, and the judgment became a lien thereon. In the latter part of 1864, Britton sold and conveyed the premises, with full covenants and warranty, subject to said mortgage, to one Burr, who purchased in ignorance of the judgment and paid the full value therefor. Burr died in the following year and his devisees sold and conveyed the property to a

Mrs. Ludlam, one of the plaintiffs herein, who, in the year 1873, sold and conveyed it to plaintiff Henry B. Barnes. Said devisees, prior to the conveyance to Mrs. Ludlam, in ignorance of the judgment, paid off the mortgage and the same was satisfied of record. The sheriff levied upon the premises in question and advertised the same for sale, whereupon this action was commenced.

Upon said facts the court directed judgment reinstating the lien of the mortgage and declaring it prior and paramount to the judgment, and also adjudging the premises free and discharged from the lien of the judgment, and directing a perpetual stay of execution on said judgment as against said premises.

ALLEN, J. So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off and satisfied by the devisees of Burr, the then owners, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities. (*Hyde v. Tanner*, 1 Barb., 76; *Runyan v. Stewart*, 12 id., 537, per Wells, J.)

BOGERT v. BLISS.

[148 N. Y. 194—1896]

ANDREWS, CH. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for \$1,000, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage; together with the bond, but the mortgage was then in the register's office and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2nd, 1891, Striker applied to Robert (a partner of Weil) for a loan of \$1,000, on the security of this extinguished mortgage, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not as we infer until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss, August 28th, 1891, and cov-

ered the same premises embraced in the Weil mortgage, and was given to secure a loan of \$1,500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11th, 1891. Bliss when he took his mortgage made no search of the title and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the General Term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretense that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to reissue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition, and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss has taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this state a mortgage is a lien simply, and the general principle is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage, will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and re-issue it as security for a new loan or transaction, and especially where the rights of third parties are in question. It would make no difference in our view whether the re-issue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the re-issue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the re-issue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to be subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this State.

The Statute of Frauds does not permit mortgage on land to be created without writing. The re-issue of a dead mortgage, if effect

is given to the transaction, is in substance the creation of a new mortgage. If this was permitted it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record and re-issue it at pleasure. A party taking from a mortgagor a re-issued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

In the present case, not only had the mortgage been paid before Robert made his loan, but he knew the fact from incontestable evidence. If he had received an actual assignment before Bliss had taken his mortgage, he would not, we think, have been entitled to a preference. Upon the facts actually existing he had merely an agreement for an assignment, which at most created an equity enforceable by equitable action, and meanwhile Bliss had obtained a legal mortgage, having no notice of the agreement. Bliss had constructive notice of the mortgage to Weil. His mortgage was subject to that incumbrance unless the mortgage had been paid. But he did not take subject to an arrangement between Striker and Robert to revive the mortgage, the lien of which had been extinguished by payment. The case of *Mead v. York* (6 N. Y., 449) is a direct authority upon the question here presented. It was there held that a mortgage after being once paid by the mortgagor cannot be kept alive by a parol agreement as security for a new liability incurred for the mortgagor as against the latter's subsequent judgment creditors. (See also *Cameron v. Irwin*, 5 Hill, 272; *Jones on Mortgages*, section 943 and cases cited.)

We find no case which sustains the claim that a mortgage paid by the mortgagor, not intended to be kept alive at the time of the payment, can be thereafter re-issued by him to secure another loan, made by a party cognizant of the fact, so as to give it validity as against a subsequent purchaser or mortgagee.

The order of the General Term should be affirmed.

All concur, except VANN, J., not sitting.

(b.) Other Discharge of Debt.

BUTLER v. MILLER. 1 Comst., 496 (1848). Trover for horses, cattle and other property. Plaintiffs claim under a chattel mortgage from Vanderpoel. Defendant, as sheriff of Columbia County, sold the property in question by virtue of an execution in favor of the Lafayette Bank. Two days thereafter Vanderpoel con-

fessed judgment in favor of the plaintiffs on the mortgage debt, which consisted of notes for \$500, and such judgment was immediately entered and execution issued and levied on the property in question.

Johnson, J. The question of the *bona fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith v. Acker* (23 Wend., 653).

The circuit judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the Supreme Court (1 Denio, 407), when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.

It may perhaps well be doubted whether the judgment was a security of a higher nature than the personal mortgage; and even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had acquired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land and gives the mortgagee no title or estate therein whatever. Whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged and operates as a transfer of the whole legal title to the mortgage, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities—certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution.

Although it is clear that the notes were merged in the judgment by operation of law, it does not I think, certainly follow that all collateral securities would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand; especially titles to property acquired under instruments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the estate or condition of the debt itself, and means no more than this—that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or

inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such interior condition was evidenced lose their vitality. It has never been applied, and I think never should be, to the extinguishment of distinct collateral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone. This most obvious and rational distinction seems to have been overlooked by the Supreme Court in the opinion to which I have referred.*

BUSH v. COOPER.
[26 Miss. 599—1853.]

MR. JUSTICE HANDY delivered the opinion of the court.

This bill was filed by the appellee in the Superior Court of Chancery, to foreclose a deed in trust executed by the appellant on the 17th March, 1840, conveying certain real estate in the town of Port Gibson to trustees, to secure the payment of two promissory notes made by the appellant, and afterwards transferred to the appellee. The facts necessary to be taken into view, in considering the questions presented for determination, are as follows:

The notes secured by the trust deed were due in January and February, 1841; and in November, 1842, a judgment at law was rendered upon them against Bush, which judgment and the deed in trust were afterwards transferred to the appellee, and remain unpaid. The deed, in conveying the property, contains the words, "grant, bargain, and sell," but contains no other covenant of warranty in express terms.

The appellant was discharged as a bankrupt in February, 1843; and in October, 1844, he purchased the property embraced in the deed in trust at sheriff's sale, under an execution on a judgment rendered in June, 1838, against the appellant, and which was unsatisfied, for the sum of \$1,033, by means acquired by him after his discharge as a bankrupt; and in virtue of their purchase he now claims to hold the property by title paramount to the lien of the deed in trust. On the contrary, the appellee claims that the property is subject to the payment of the debt secured by the deed in trust, notwithstanding the discharge of the appellant as a bankrupt, and that the appellant's purchase, under the prior incumbrance, cannot be set up by him to defeat the security of the deed in trust.

The first question to be settled is, whether the discharge of the appellant from the debt, by his certificate as a bankrupt, extinguished the deed in trust.

It is insisted, on his behalf, that the deed was but a mere incident to the debt, and that whatever discharged the debt necessarily destroyed the deed, because the security could not exist where the debt, which was its foundation and support, was discharged. This is undoubtedly well sustained by modern decisions, as a general rule; but

* Judgment was rendered in favor of defendant, on the ground that the plaintiffs by their subsequent dealings in relation to the property had conclusively elected to claim title by virtue of the levy and not under the mortgage.

it is not without exceptions. It is held to apply in all cases where the debt has been actually paid, or where it was not supported by a valid legal consideration, or where the debtor *ex aequo et bono* is discharged from its payment. But it is held not to apply to a case where an action upon the debt has been barred by the statute of limitations, and that the creditor may proceed to foreclose his mortgage, notwithstanding the bar of the debt by the statute. *Miller v. Helm*, 2 S. & M., 697; *Miller v. Trustees of Jefferson College*, 5 ib. 650; *Bank Metropolis v. Gultshtick*, 14 Peters, 19; *Thayer v. Mann*, 19 Pick., 535.

In addition to this, the objection is fully met by the second section of the bankrupt act of Congress of 1841, which provides that "nothing in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal," &c. From this it is manifest that, while the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property, was left in as full force as though the debtor had never been discharged from the debt, for the security of which the lien was made.

PRATT v. HUGGINS.

[29 Barb. 277—1859.]

HOGEBOOM, J. The facts of this case lie within a narrow compass. The plaintiff by action commenced in 1855, seeks to foreclose a mortgage under seal, executed in 1835, for a debt falling due in 1836, which mortgage was accompanied by a promissory (unsealed) note to secure the same debt. The mortgage contains no covenant to pay, but the condition is that the instrument shall be void, if the above sum, with interest, is paid on the 1st of February, 1836, "in the manner particularly specified in the condition of his (the mortgagor's) certain bond or obligation bearing even date herewith." The mortgage was duly acknowledged and recorded. The answers interposed several defences; and, among others, the defence of payment; and that the plaintiff's cause of action was barred by the statute of limitations, in consequence of its not accruing within six years before suit brought. The justice before whom the cause was tried, without a jury, came to the conclusion, upon the evidence, that there was an unpaid balance due on the note, and that he should have given judgment for the plaintiff, but for the fact that more than six years had elapsed since the said note became due, and the cause of action thereon accrued prior to the commencement of this suit; and for that reason he gave judgment for the defendants. The case therefore presents the question, whether a debt secured by a sealed mortgage and unsealed note can be enforced by a foreclosure of the mortgage, after the expiration of six but before the expiration of twenty years from the time when the debt became due. As has been said, there is no covenant in the mortgage to pay the debt; but at the same time the debt, its amount and the time of payment, are specified in the mortgage; and it is provided that in

case "default shall be made in the payment of all or any part of the said principal sum of two hundred and fifty dollars, or the interest thereof, at the time or times when the same ought to be paid as aforesaid, that then, and in such case, the mortgagee may sell and dispose of the premises, &c. The true question, therefore, would seem to be, has the mortgage been paid? Or, rather, in this case, is the lapse of six years since the maturity of the note, without any subsequent recognition or acknowledgement of the debt conclusive evidence of payment? The justice trying the cause has come to the conclusion, upon the evidence, that a part of the debt is actually unpaid. Is there a legal bar to giving effect to that conclusion by rendering judgment for the plaintiff, in consequence of the lapse of time before mentioned. If this is substantially an action upon the note, then it is barred, for it is an action upon simple contract, and must be brought within six years. (Code, s. 90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The remedy is taken away. But this is not in terms or effect an action upon the note. The mortgage would be good without the note. If there had been no note, but only the evidence of the debt recognized in the mortgage, is there any doubt that the mortgage could have been enforced after the debt became due, and for twenty years afterwards? The only question would be, was there a debt remaining unpaid—a security upon real estate—and was the lien enforced during the period that the law gives it legal existence. The additional recognition of the debt, in the shape of a promissory note, ought not to detract from its force. It is said that the note is the principal, and the mortgage only the incident; that is, that is given only as a security for the note. In a certain sense, this is true. But in fact the debt itself is the principal thing, and the note is one form of security for, or evidence of, the debt, and the mortgage another. Suppose the mortgage contained a covenant to pay the debt, would it be any the less the principal thing than the note? True, the note (if negotiable) would have some facilities for an easy transfer, and might be negotiated independent of the mortgage. If so transferred, it would in law carry the mortgage with it, and so would the mortgage carry the note with it. The payment of either would be the payment of the other, except so far as a *bona fide* holder of the note for value is concerned, who might, under the law applicable to commercial paper, be protected. It is said that the note, from the lapse of time, is presumed to be paid. Not altogether so; for the law allows a suit upon it, and a recovery, unless the statute of limitations is pleaded. It is therefore, at most, but a presumption, suffered to be overthrown, it is true, only in one way, and that is, by proof of payment thereon, or recognition thereof, in the way pointed out in the statute. This, however, as before stated, only acts upon the remedy. It is an arbitrary and an artificial rule, not to be carried, I think, beyond the well defined limits of the statute itself.

GOULD, J. At the December term, 1858, this case was submitted upon briefs, without oral argument. And on that submission I wrote this brief opinion:

The mortgage is defeasible on condition that \$250 be paid. The statute of limitations affects not the right to the money, but the remedy therefor. It says to the creditor, not "you are paid," but "you cannot call on a court of law to enforce payment." And the defense in this case is, not that the mortgagor has complied with the condition: but that, if he were sued at law on the note, the statute of limitations could be interposed as a legal bar to a recovery. Very true; but he is not sued on the note; and the plea (by answer) does not pretend that he has performed the condition: which, and which only, would defeat the mortgage-title. He does not bring himself within the equity of defeasance; and the title remains good, under seal, it is asserted, within twenty years, and it can be defeated only according to the tenor of the defeasance. This view is sustained in *Heyer v. Pruyn* (7 Paige, 470), and is precisely and very satisfactorily covered by the case of *Thayer v. Mann* (19 Pick., 535). There should be a new trial.

As this opinion was thought to overrule the case of *Jackson v. Sackett* (7 Wend., 94) my associates deemed it best to have a full argument before coming to such a result; and on such argument it now comes up.

My views remain unchanged; and, though it is rather difficult to say what the case of *Jackson v. Sackett* did decide, still, if to order a new trial in this case that case must be reversed, I should order the new trial. That case founds its reasonings on the basis that the statute of limitations is a defense, because the law, from lapse of time, presumes payment. I do not so understand the statute of limitations. I understand mere lapse of time to be a full defense, because the statute says so; "*Ita lex scripta*;" and there is need of no such presumption to help out an absolute rule. But that case departs from its premise, or presumption of payment being merely the basis of a positive statute bar, when it says (at p. 100): "But the presumption arising from lapse of time is but evidence to the jury, from which they may infer that the debt has been satisfied." This, though true on a question of fact (as to actual payment), cannot be said of a legal presumption arising from an admitted fact. The lapse of time was either a bar, or no bar. If, by the statute, a bar, it needed no help from presumption. If not, by the statute, a bar, no presumption could help it.

But since my first opinion was written, there has been published a decision (given indeed in 1857, but not then printed), by which the Court of Appeals clearly takes the view that I did. (*Waltermire v. Westover*, 4 Kern. 16.) At page 20, "Such statutes act upon the remedy merely, and not upon the debt." And at pages 21-2 "If statutes of limitation do not discharge the debt, but act exclusively upon the remedy, upon what principle of interpretation is it to be held that this statute which is in terms confined to the remedy by action, operates to annihilate a remedy by execution. The statute does not operate by producing any presumption of payment; but is a mere statutory bar, founded in principle of public policy."

In the case before us, the statute of limitations (where it speaks of the lapse of six years as a bar) is in terms confined to an action at law on the note; and cannot operate to annihilate a remedy on the mortgage, by which a court of equity cuts off the equity of redemption. The decision in 4th Kernan is abundant authority for ordering a new trial in this case.

The judgment of the Circuit Court should be reversed, and a new trial ordered; costs to abide the event.

Wright J., concurred.

*New trial granted.**

BORST v. COREY.
[15 N. Y. 505—1857]

On the tenth of August, 1837, the plaintiff and the defendant, Samuel Newkirk, as executors of the last and testament of James Halliday, deceased, conveyed to the defendant, David P. Corey, a piece of land in Montgomery County for \$1,600, subject, however, to a mortgage thereon for about \$635, and this action was commenced August 5th, 1847, in the Supreme Court, on the equity side, to obtain a sale of the premises, by virtue of the equitable lien, for the purchase price. The complaint in the action set forth the conveyance of the premises by the executors, alleged that no part of the purchase price had been paid by the grantee except the amount of the mortgage, and asked for a decree that the premises be sold, and the purchase price and interest be paid from the proceeds of the sale. The complaint further alleged that the executor, Newkirk, had refused to join with the plaintiff in the commencement and prosecution of the action, and was therefore made a defendant.

The defendant, Newkirk, suffered the bill to be taken as confessed.

The defendant Corey, by his answer, alleged that, prior to the delivery of the deed to him, he paid the purchase price of the land in full, except the amount of mortgage thereon, and had subsequently paid the mortgage; and that he had not, at any time within six years next prior to the commencement of the action, been indebted to the executors of either of them, for or on account of the purchase price of the premises, or promised to pay the same; and that no cause of action had accrued for the same within the six years. To this answer a general replication was put in.

The action was tried before referees, and they found that more than six years had elapsed since the sale of the premises in question prior to the commencement of the action; and decided that the plaintiff be nonsuited, on the ground that the cause of action, to enforce which the suit was brought, was barred by the statute of limitations. No bond or mortgage, or other written instrument, was taken to secure the payment of the purchase price of the land, and it does not appear that any credit was given therefor.

* *Accord*, Hulbert v. Clark, 128 N. Y., 295; *contra*, Pollock v. Maison, 41 Ill., 516.

Judgment having been entered on the report, the plaintiff appealed therefrom; the Supreme Court, at General Term, in the third district, affirmed the judgment; and the plaintiff appealed to this court.

BOWEN, J. The purchase price of the land in question was due and payable on the conveyance of the land to the defendant Corey, and as this action was not commenced until more than six years after the conveyance and as no promise to pay was shown to have been made within six years, the statute of limitations would have been a complete bar to an action at law to recover the purchase price. (2 R. S., 295, Sec. 18.)

This action, however, was one of equitable cognizance. At the time of the commencement of the action, the relief sought to be obtained in the manner applied for, that is, by a sale of the premises under the equitable lien thereon for the purchase price, could have been awarded by a court of equity only.

An action at law, if commenced at any time within six years after the conveyance, could have been maintained against the defendant Corey, in which a judgment against him personally would have been rendered. The object of such an action, and the relief sought for therein, would have been the recovery of the unpaid purchase price of the land. The same relief, and no other or different, is sought to be obtained in this action, and a court of equity was resorted to solely for the reason that courts of common law jurisdiction could not award relief otherwise than by a judgment against the defendant personally. The same facts which would constitute a defense to the action at law would also be a defense to this action, unless the statute of limitations be an exception.

So, too, the cause of action, to wit, the non-payment of the purchase price of the land, is the same, whichever court is resorted to.

It is true that, to sustain the suit in equity, the plaintiff must bring to his aid the equitable lien given by law, while the action at law can be sustained without reference to such lien. But the lien is merely an incident to, and must stand or fall with the debt. The debt is the basis or foundation of the lien. The latter cannot exist without or independently of the former. In the suit to enforce the lien the cause of action, and the only substantial cause of action is the debt.

The forty-ninth section of the title of the Revised Statutes, entitled "Of the time of commencing actions" (2 R. S., 301), provides that "whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, *of any cause of action*, the provisions of this title, limiting a time for the commencement of a suit *for such cause of action*, in a court of common law, shall apply to all suits hereafter to be brought *for the same cause* in the Court of Chancery."

I do not see why this case does not come within the letter of the above provision. It certainly does, if I am right in supposing that the defendant's indebtedness for the purchase price of the land constitutes, in the language of the statute, the plaintiff's *cause of action*."

Prior to the Revised Statutes, there was no statute in this State limiting the time for commencing actions in courts of equity. Yet, previously to the adoption of those statutes, it was frequently held that, in cases where there was a concurrent jurisdiction at law and in equity, time was as absolute a defence to the action in equity as to one at law; not on the ground of expediency, or as a matter of discretion founded on analogy to the statute of limitations, as was the case in some actions of purely equitable cognizance, but in obedience to the statute. (*Rosevelt v. Mark*, 6 John. Ch. R., 266; *Kane v. Bloodgood*, 7 id., 90; *Murray v. Coster*, 20 John., 576; *Sawyer v. De Meyer*, 2 Paige, 574; *Humber v. Trinity Church*, 7 id., 195; 24 Wend., 587; *Story's Eq.*, Sec. 529.)

I think this case comes within the principle established by the above authorities, and that, independently of the statutory provision, limiting the time of commencing actions in courts of equity, it should be held that the six years' limitation to actions at law constitutes a defence to this action. The provision of the Revised Statutes, limiting the time of commencing actions in courts of equity, was adopted as declaratory of the law as then existed, and not as introducing a new rule. (3 R. S., 705, revisers' notes.)

It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other.

It has, however, been held that, where a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debts was no bar to an action to foreclose the mortgage. (*Balch v. Onion*, 4 Cush., 559; *Thayer v. Mann*, 19 Pick., 535; *Elkin v. Edwards*, 8 Geo., 325; *Heyer v. Pruyn*, 7 Paige, 465.)

But there is a material distinction between a mortgage and the equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce such a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and, by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom. No action at law can be predicated upon the mortgage, to collect the debt secured thereby, unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to be of a higher nature than one by simple contract.

On the contrary, the equitable lien is neither created or evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it.

It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt; it only bars the remedy.

But the remedy by action at law is no less barred than that by **suit in equity** to enforce the lien.

Denio, C. J., delivered an opinion for affirmance upon **substantially** the same grounds as those stated by Bowen, J.

All the judges except Brown, J. (who did not vote), **concurring** in this opinion.

*Judgment affirmed.**

* Followed in *Trotter v. Erwin*, 27 Miss. 772. But see *Hulbert v. Clark*, 128 N. Y. 295, 300 where it is said of *Borst v. Cary* that "the reasoning by which the result was reached in that case is not altogether satisfactory."

